Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AND THE ARIZONA CORPORATION COMMISSION,

Petitioners,

v.

UNITED STATES TELECOM ASSOCIATION, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit Circuit

PETITION FOR A WRIT OF CERTIORARI

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June 30, 2004

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QUESTIONS PRESENTED

The Telecommunications Act of 1996 is exercise in cooperative federalism designed to "fundamentally restructure[] local telephone markets." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). Key provisions, 47 U.S.C. §§ 251 & 252, create a critical State role in the process of allowing competing local exchange carriers ("LECs") to gain entry via interconnection, resale, or access to incumbent LECs networks. Congress specified that (1) *States may implement pro-competition measures consistent with the Act.* 47 U.S.C. § 251(d)(3) & § 261 and (2) preemption is not to be implied, 47 U.S.C. §152 (§ 601, *codified in* notes) At its core, this case is about the role Congress expected States to play in the scheme established in 1996. Questions include:

1. Whether, in administering a statute that is an exercise in cooperative federalism, a federal agency is barred from asking States to make additional determinations in accord with substantial guidance provided by the agency where that Act (§ 251(d)(3)) expressly reserves to States authority to make independent unbundling determinations?

2. Alternatively, assuming the Court was correct it its "subdelegation" analysis, whether *vacatur* was proper given that *Congress* has expressly and directly delegated to States the authority to make unbundling decisions?

3. Whether, the FCC's reversal of previous findings requiring line sharing, upheld on review, is adequately explained and supported by substantial record evidence?

4. Whether the FCC proposal to examine if a delisted element's rate satisfies the just and reasonable pricing standard of §§ 201 & 202 through a § 271(d)(6) enforcement proceeding is consistent with the § 252 scheme requiring State arbitrations of disputed terms associated with an interconnection agreement and the limitation on § 201 to cover only "interstate or foreign communication."

PARTIES TO THE PROCEEDING* AND RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioners state as follows: The ***National Association of Regulatory Utility Commissioners (NARUC)*** is a quasi-governmental corporation organized under the laws of the District of Columbia with its principle place of business in Washington, D.C. Created in 1889, NARUC's members include the State public service commissions in the fifty states, the District of Columbia, Puerto Rico, and the Virgin Islands charged with overseeing the activities of, *inter alia*, communications common carriers. NARUC has no parent corporation. No publicly traded company owns any equity interest in NARUC. NARUC adopts policy stances through resolutions passed by its members. NARUC's day-to-day operations are governed by its Officers, Executive Committee, Board of Directors, and Standing Committees. Only commissioners from the agencies that constitute its membership are allowed to serve as officers or as voting members of those bodies. Co-petitioner ***Arizona Corporation Commission*** is a State governmental entity so no Rule 29.6 statement is necessary.

Along with Petitioners, the following were also parties to the District of Columbia Circuit proceedings below: (1) AT&T Corp. (2) AT&T Wireless Services, Inc. (3) Allegiance Telecom, Inc. (4) Association of Communications Enterprises (5) Association for Local Telecommunications Services (6) Allegiance Telecom, Inc. (7) BellSouth Corp. (8) Birch Telecom, Inc. (9) BridgeCom International, Inc. (10) CIMCO Communications, Inc. (11) Catena Networks, Inc. (12) Cbeyond Communications, LLC (13) CO Space Services, LLC (14) Competitive Telecommunications Association/ASCENT (15) Alliance (16) Conversent

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* In addition to the certificate of service filed concomitantly with this petition, Petitioners also e-mailed copies of this brief to at least one representative of the parties listed on the certificate of service.

Communications, LLC (17) Covad Communications Company (18) Data Net Systems, LLC (19) EarthLink, Inc. (20) Eschelon Telecom, Inc. (21) El Paso Networks, LLC f/k/a El Paso Global Networks (22) Federal Communications Commission (23) Focal Communications Corp. (24) General Communication, Inc. (25) ICG Communications, Inc. (26) InfoHighway Communications (27) Information Technology Association of America (28) KMC Telecom III, LLC f/k/a KMC Telecom, Inc. (29) LDMI Telecommunications, Inc. (30) Manhattan Telecommunications Corp. d/b/a Metropolitan Telecommunications (31) McLeodUSA Telecommunications Services, Inc. (32) Mpower Communications Corp. (33) National Association of State Utility Consumer Advocates (34) National Telecommunications Cooperative Association (35) Network Access Solutions Corp. (36) Network Access Solutions, Inc. (37) New York Public Service Commission (39) NewSouth Communications Corp. (40) Nextel Communications, Inc. (41) NuVox, Inc. (42) Pennsylvania Public Utility Commission (43) Public Utilities Commission of the State of California (44) People of the State of New York and Public Service (45) Commission of the State of New York (46) Promoting Active Competition Everywhere Coalition (47) Qwest Communications International Inc. (48) Qwest Corp. (49) RCN Telecom Services, Inc. (50) Rhythms NetConnections, Inc. (51) Sage Telecom, Inc. (52) SBC Communications Inc. (53) SNiP LiNK, LLC (54) Sprint Corp. (55) T-Mobile USA, Inc. (56) TDS Metrocom, LLC (57) Talk America Inc. (58) Telecommunications Resellers Association (59) United States of America (60) United States Telecom Association (61) VeriSign Communications Services f/k/a Illuminet (62) Verizon Telephone Companies (63) WorldCom, Inc.(MCI) (64) XO Communications, Inc. (65) Xspedius Communications, LLC (67) Z-Tel Communications, Inc.

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APPENDIX B

In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, 18 F.C.C.R. 16798 (2003), corrected by *Errata*, 18 F.C.C.R. 19020 (2003).

APPENDIX C

Federal statutory materials.

** As also pointed out in footnote 1, *infra*, Counsel of Record, concerned that estimated cost of reproducing the 1000 page+ required appendix could effectively prevent the States from filing a petition, contacted Mr. Chris Vasel of the Supreme Court's Clerk's office (202-479-3027). Mr. Vasel confirmed in two separate phone calls, that NARUC and its co-petitioners could cite to the appendix being filed June 30, 2004 by AT&T *et. al.* seeking review of the same D.C. Circuit decision. NARUC contacted counsel for AT&T and arranged to receive an early copy of their appendix. Accordingly, all appendix cites in this document are to the appendix filed by AT&T *et.al.*

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The opinion of the court of appeals (App.A-1a *et seq.*)[1] is reported at 359 F.3d 554. The Federal Communications Commission's order (App.B-66a *et seq.*) is reported at 18 FCC Rcd. 16,978, and an *Errata* correcting the order is reported at 18 FCC Rcd. 19,020.

JURISDICTION

The court of appeals entered judgment March 2, 2004. This Court has jurisdiction under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Statutory provisions are from the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, and are reproduced at App. C-1036a *et seq.*

INTRODUCTION

This Court should grant certiorari and reverse the decision below, *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 565-69 (D.C. Cir. 2004) ("*USTA II*"), because that decision conflicts with decisions of this Court and other courts of appeals, because it effectively disables critical provisions of an "unusually important legislative enactment," *Reno v. ACLU*, 521 U.S. 844, 857 (1997), the Telecommunications Act of 1996, and because that decision also threatens other federal programs that depend upon schemes of "cooperative federalism."

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[1] Concerned that the cost of reproducing the 1000 pages+ appendices would not allow the States to file a petition, Counsel contacted Mr. Chris Vasel of the Supreme Court's Clerk's office, who confirmed in two separate phone calls, that NARUC could cite to the appendices also being filed today by AT&T *et al.* seeking review of the same D.C. Circuit decision. NARUC contacted counsel for AT&T and arranged to receive an early copy of their appendix. Accordingly, all appendix cites in this document are to the appendix filed by AT&T *et al.*

In the decision below, the D.C. Circuit vacates portions of the FCC's *Triennial Review Order* ("*TRO*")[2] requiring incumbent local exchange carriers ("ILECs") to share components of their local networks with competitors, and establishing extensive federal standards to guide State commissions in determinations of which unbundled network components do *not* have to be shared. It finds that States can play no role in these determinations, and that the FCC's findings are inadequate standing alone. It simultaneously upholds broad FCC determinations *limiting* other sharing ("unbundling") rights of competitors, *e.g.*, so-called "line-sharing;" determinations that cannot, and do not, reflect conditions in specific markets. This D.C. Circuit decision jeopardizes competition in the local exchange market that has developed over the last decade, which is dependent on those rights. It also upholds FCC determinations with respect to pricing that simply ignore clear Congressional assignment of certain tasks to the States. For more than a decade, State commissions across the country have expended extraordinary resources to introduce, maintain and encourage competitive markets. Although States have done much of the heavy lifting to bring competition to local markets, the Court's decision effectively limits States' ability to play a further substantive role. The FCC is not well positioned to succeed without the States' assistance, given the heavy burden the Court imposed as a prerequisite to authorizing unbundling. The result is an order that effectively disables many of the Act's critical leasing provisions. It also flies in the face of the cooperative scheme established by the Act and the express authority given to States to make unbundling determinations.

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[2] *In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 F.C.C.R. 16798 (2003), corrected by *Errata*, 18 F.C.C.R. 19020 (2003) ("*TRO*").

The court reached this result by starting from the premise that the Act creates a strong presumption *against* unbundling, a premise contrary to the basic structure of the Act, as well as to this Court's conclusions in *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) ("*IUB*") and *Verizon Communications, Inc. v. FCC*, 535 U.S. 467 (2002) ("*Verizon*"), and *Verizon Communications Inc. v. Law Offices of Curtis v. Trinko*, 124 S. Ct. 872 (2004) ("*Trinko*").

The D.C. Circuit's *vacatur* of the FCC's decision granting unbundling rights also was based on the FCC's simultaneous decision to "delegate" to State commissions the task of identifying any particular markets where those rights would not apply. The D.C. Circuit held such delegation was impermissible absent express authorization from Congress. In the court's view, even given the cooperative federalism approach of the statute,[3] and the clear reservations of State authority to impose unbundling,[4] federal agencies "may not subdelegate to outside entities – private or sovereign – absent affirmative evidence of authority to do so." *USTA II*, 359

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[3] Congress intended the States and the FCC "craft a working relationship. . .built on mutual commitment to local service competition . . .in which the FCC establishes uniform, national rules for some issues, the States and the FCC administer these rules, and the States adopt other critically important rules to promote competition." *In re Implementation of the Local Competition Provision of the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶ 53 (1996) ("*Local Competition Order*,"); *see also* former FCC Rule 317 (1996), 47 C.F.R. §51.319 (1996).

[4] *Compare, e.g.*, 47 U.S.C. § 261 (preserving existing and additional State regulations "to further competition.") App.C-1057a; 47 U.S.C. § 252(e)(3) (preserving "requirements of State law in [the State commission's] review of an agreement") App.C-1052a; 47 U.S.C. § 253(b) (preserving "the ability of a State to impose . . . requirements necessary to preserve and advance universal service . . . and safeguard the rights of consumers") App.C-1055a; 47 U.S.C. § 254(i) (directing States to ensure that "universal service is available at rates that are just, reasonable, and affordable"); 47 U.S.C. § 153(41) (recognizing State "regulatory jurisdiction with respect to intrastate operations of carriers").

F.3d at 566. That ruling squarely conflicts with both *Wisconsin Dep't of Health and Family Servs. v. Blumer*, 534 U.S. 473, 495-96 (2002), and *Batterton v. Francis*, 432 U.S. 416 (1977), as well as decisions from other courts of appeals. This Court should grant certiorari to resolve these conflicts.

The court's decision never comprehensively addresses critical flaws in the FCC's order - ignoring the disparity between the statutory requirement for arbitrations of disputed "interconnection" terms and the FCC's proposal to enforce different pricing standards via a § 271 enforcement proceeding. The decision also devotes little space to the clear frailties of the FCC's analysis of the line-sharing issue.

STATEMENT OF THE CASE

For over a century, regulation of local communications service has been a State matter, while interstate communications was the province of the Federal Communications Commission ("FCC"). *See, e.g., Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133, 148-49 (1930). Until recently, local service was provided by monopoly providers granted exclusive franchises by State regulators, while those same providers' interstate long-distance operations were supervised by the FCC. In 1982 the Justice Department and AT&T entered a consent decree divesting AT&T of its local regional Bell Operating Companies ("BOCs"). *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd mem.*, 460 U.S. 1001 (1983). As a result of that structural separation, along with FCC rules requiring AT&T to provide competitors access to its long-distance facilities, long-distance telephone markets became competitive. *See NARUC v. FCC*, 737 F.2d 1095, 1101-11 (D.C. Cir. 1984). In the 1990s a similar transformation began in local telecommunications markets. State legislatures and regulatory agencies began to encourage competition in their local markets. The States copied the model that had been successful in the long-distance market,

requiring the local telephone monopolists to share their network facilities with would-be competitors at regulated rates. By 1996, fifteen States, representing 48% of the nation's phone lines, were "in the advanced stages of the process towards local competition," with another eleven States being at the "middle stages of the regulatory process" toward local competition. *See* Stephanie Comfort, *et al.*, *Telecommunications Services: National Survey of Local Competition Issues: A State-by-State View* (1996).

In the Telecommunications Act of 1996, 47 U.S.C. § 151 *et seq.*, Congress made this move towards local telephone competition national policy, and sought to introduce a role for the FCC while maintaining the momentum and expertise that lay with the States. The 1996 Act thus is "an exercise in what has been termed cooperative federalism." *Puerto Rico Tel. Co. v. Telecom. Reg. Bd. of Puerto Rico*, 189 F.3d 1, 8 (1st Cir. 1999). It required the FCC to work hand-in-hand with State agencies bodies to open local markets to competition. *See, e.g., Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 124 S. Ct. 872, 876, 882 (2004) (discussing specific examples of the FCC and State commissions working cooperatively to implement the pro-competitive goals of the 1996 Act); Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. Rev. 1692, 1694 (2001) (describing the 1996 Act as "perhaps the most ambitious cooperative federalism regulatory program to date"). A key section of the Act is 47 U.S.C. § 251(c)(3) requiring the "unbundling," or sharing, of the incumbent's network facilities, or "elements." App.C-1039a. That provision adopts as a federal matter the rules already in place in many States to bring competition to local markets by requiring sharing of network infrastructure. It also requires both the FCC and State regulators to implement the Act's unbundling regime.

The provisions of § 251(d) (App.C-1041a) govern the implementation of the Act, including the requirements specified in § 251(c). (App.C-1038a) With exceptions not relevant here,[5] Congress did not require the FCC to issue regulations implementing any specific subsection of § 251's market-opening provisions. It did, however, require the FCC generally to "complete all actions necessary to establish regulations to implement the requirements of [§ 251]" within six months. 47 U.S.C. § 251(d)(1); App.C-1041a. By requiring the FCC to "complete all actions *necessary* to establish regulations," rather than requiring the FCC to "complete *all* regulations," Congress evidently contemplated a regime in which the FCC might not itself always establish the regulations, but might instead share regulatory responsibilities. Congress also required that in those circumstances where the FCC did set "access standards" to "determine[] what network elements should be made available" under the Act's leasing provision, it "shall consider, at a minimum, whether" competitors would be "impaired" without access to the incumbents' non-proprietary facilities. § 251(d)(2); App.C-1041a.

In addition to the implications inherent in the language of § 251 generally, Congress also expressly preserves State local competition law, mandating that the FCC "*shall not preclude* the enforcement of any regulation, order, or policy of a State commission" that establishes unbundling obligations of local carriers, is consistent with the requirements of § 251, and "does not substantially prevent implementation of the requirements of this section and the purposes of this part." 47 U.S.C. § 251(d)(3) (Emphasis Added). (App.C-1041a)

Moreover, under the Act it is the States, not the FCC, that have final word on the terms that govern inter-carrier relationships. The terms of the ILECs' leasing arrangements

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[5] *See,* 47 U.S.C. § 251(e) (numbering authority)(App.C-1042a).

with its competitors are set through voluntary negotiations. § 252(a)(1); App.C-1046a. *If those negotiations fail, Congress designated State commissions, not the FCC, to set the actual interconnection agreement terms that govern the leasing required by federal and State law.* § 252(b); App.C-1047a. In setting those terms, State commissions are to follow FCC regulations to the extent they govern resolution of a disputed matter. *See* 47 U.S.C. §§ 252(c)(1); (App.C-1049a); 252(e)(2)(B); (App.C-1051a); *IUB*, 525 U.S. at 385 n.10. But to the extent the disputed matter is not subject to any FCC rule, the States are to apply the unbundling and other requirements of the Act itself, as well as their own law so long as it is consistent with the larger purposes of the Act. Congress thus left it to the State commissions, "guided by the provisions of the Act and by the concomitant FCC regulations," to "exercise their expertise about the needs of the local market and local consumers." *Puerto Rico Tel. Co.*, 189 F.3d at 14. *See, e.g.*, 47 U.S.C. §§ 252(e)(3); (App.C-1052a); 253(b) (App.C-1055a);, 261(b)-(c) (App.C-1057a); § 152 note (Pub. L. No. 104-104, § 601(c)).

Three times, the FCC has issued regulations implementing the statutory unbundling requirements. Each effort has been reversed by the courts. In its first two regulations, the FCC was reversed for failing to give sufficient substantive content to the statute's "impairment" requirement. *IUB*, 525 U.S. 366, 388 (1999); *USTA v. FCC*, 290 F.3d 415, 428 (D.C. Cir. 2002). *But in both of these sets of regulations, the FCC's process for implementing its unbundling standard delegated to the States a prominent role in unbundling network elements, and this feature has been (until now) consistently upheld by the courts.*

It has been a consistent feature of the regulatory framework *since 1996* that the FCC defined "impairment," unbundled certain facilities on a nationwide basis pursuant to that standard, *and then left to the State commissions the responsibility of applying the FCC's impairment definition to*

unbundle additional elements as State-specific conditions required. See 47 C.F.R. §§ 51.317 (1996), 51.319 (1996), 51.317 (1999), 51.319 (1999). Until the decision below, the FCC's authority to delegate the unbundling decision to the States has never been disputed.[6]

The third set of unbundling regulations that are at issue here were the result of the FCC efforts to comply with the court of appeals' mandate in *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 421-28 (D.C. Cir. 2002) ("*USTA I*"), *cert. denied*, 538 U.S. 940 (2003). There the D.C. Circuit rejected the FCC's unbundling rules principally because, in the court's view, they were not sufficiently "granular." According to the court, the FCC's nationwide rules were not

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[6] Indeed, the only challenges to the role afforded to the States in these first two regulatory programs was that the States were not given a prominent *enough* role. Incumbent carriers vigorously advocated that the FCC should not identify *any* specific unbundled elements, but should leave it to the States to apply the FCC general standards to specific elements. One incumbent, argued in the FCC's second rulemaking proceeding that, "[i]n a whole range of contexts, State arbitrators must apply national standards, and there is no reason why they are incapable of doing so here." Comments of Ameritech, CC Docket No. 96-98, *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, at 64-65 (May 26, 1999); *see also id.* at 67 (arguing that the FCC should adopt general unbundling standards, which "could be applied by State commissions on a market specific basis"). *See also* Comments of Qwest Communications Corp., CC Docket No. 96-98, *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, at 40 (May 26, 1999) ("the State commissions can and should have an important role in developing the factual record needed to determine whether a wholesale market has developed in a particular geographic area"); Comments of US West, Inc., CC Docket No. 96-98, *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, at 30 (May 26, 1999) ("State-level determinations would bring needed flexibility to the Commission's unbundling regime because both new entrants and incumbents would be allowed to rebut a Commission presumption with evidence that the presumption is not accurate for an individual market or area").

carefully enough calibrated to assure that unbundling would occur only in the specific locations in which there was an administrative record supporting a finding of impairment. *USTA I*, 290 F.3d at 422-26. The court also criticized the FCC for not adopting a rigorous definition of impairment. *Id.* at 426-28. Finally, the court vacated the FCC's decision granting competitors access to "line sharing," the process by which competitors lease only the high frequency portion of the loop used to provide broadband service (such as high speed internet access). The court said that the FCC had failed to adequately consider the availability of intermodal alternatives. *Id.* at 428-30.

In response, the FCC adopted a rigorous definition in which it would find impairment only where CLEC competition would be uneconomic in the absence of unbundling. It then applied that definition to the particular markets identified in the record – the enterprise market (large business customers) and the mass market (residential and small business customers) – and also considered whether there were policy reasons not to unbundle even where CLECs were impaired. Based on these considerations, the FCC eliminated unbundling of many elements. Among these were the broadband capabilities of the analog loops used to serve mass market customers when these are made up partly or entirely of fiber, as is increasingly the case.

In addition to eliminating competitors' access to the broadband capabilities of loops partly made of fiber, the FCC substantially reduced the ability of competitors to provide broadband service over the copper loops that are still used by the majority of residential customers. In other words, the FCC reversed its longstanding decision allowing competitors to engage in "line sharing." *TRO* ¶¶ 255-63; App.B-326a. The FCC concluded that if CLECs wanted to provide broadband service, they needed to lease the entire copper loop, including the capabilities of the loop used to provide voice service, even though this would force them to

enter two markets (voice and data) simultaneously. Two commissioners dissented. Chairman Powell explained that "line sharing has clear and measurable benefits for consumers," and "pressure[s] incumbents to deploy more advanced networks." Powell Statement at 1-2; App.B 957a. *See also Verizon*, 535 U.S. at 516-17. Commissioner Abernathy explained that the majority had "not advanced a clear rationale that overcomes the record evidence that line sharing promotes competition *and* investment." Abernathy Statement at 7; App.B 998a. A third commissioner on the five member Commission explained that he too would have preferred to maintain line sharing. Copps Statement.

In addition to limiting competitors' access to broadband capabilities, the FCC dramatically reduced access to other unbundled elements. It eliminated competitors' access to switching when used to serve enterprise customers, and also eliminated access transport at high capacity levels. But the FCC maintained access to other elements, making national findings of impairment concerning switching used to serve mass market (residential and small business customers) and transport (at lower capacity levels).

With respect to switching, the FCC reached the same conclusion reached by many States that have examined the evidence – while competitors have deployed their own switches to serve large business customers, they have generally not used those switches to serve mass market customers because of significant barriers to doing so.[7] The FCC found that while competitors had deployed 1300 switches to serve enterprise customers and had every incentive to fill up those switches by serving mass market

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[7] *See, e.g.*, Report of the Michigan Public Service Commission, Case No. U-12320, January 13, 2003, at 3, available on-line at: http://www.cis.state.mi.us/mpsc/orders/comm/2003/u12320m271report.pdf (explaining that the local residential competition that made it reasonable to permit SBC to provide long distance service stemmed almost entirely from competitors that leased unbundled switching).

customers, *TRO*¶ 447 n. 1365; App.B-532a, competitors served at most 3 million residential lines on their own switches – less than 3 percent of the market, and most of these lines were provided by cable companies that are in a unique position because they do not have to lease loops from incumbents. *TRO* ¶¶ 438-440; App.B-525a The FCC found that a key reason for this is that the hot cut process by which the incumbent manually breaks a hardwired connection between its loop and switch and reconnects the loop to the competitor's facilities, "lead[s] to provisioning delays and service outages," *id.* ¶¶ 465-66; App.B-554a, and is presently unworkable at the volumes that would be needed to serve the mass market, *id.* ¶¶ 459, 465, 468-69; App.B-549a, 554a, 558a, citing to State findings. *Id.* ¶ 469; App.B-561a. The FCC pointed out that even at present hot cut volumes, CLECs, such as AT&T, that have attempted to use this process have been forced to withdraw from the market. *TRO* ¶¶ 465, 468; App.B-554a, 558a. Moreover, the FCC found that in addition to hot cuts, substantial cost disadvantages faced by competitors could render competition uneconomic in particular markets, though the FCC did not rest its national finding on this fact. *TRO* ¶¶ 476-485; App.B 573a.

As with mass market switching, the FCC made a national finding of impairment with respect to transport facilities below a certain capacity level. A unanimous FCC generalized from empirical evidence of where deployment had occurred and economic evidence of where revenues could justify the fixed and "sunk" investments in alternative transmission facilities to find that competitors did not need access to incumbent facilities above these thresholds but did need access below the thresholds. *TRO* ¶¶ 371, 376, 386-88; 390-92, 401 & n.1245, 410; App.B 453a, 459a, 470a-473a, 477a-479a, 487a, 496a.

While the FCC found that competition using CLECs' own mass market switching and lower capacity transport facilities was not possible "in the large majority of

locations," *TRO* ¶¶ 473, 387; App.B-570a, 471a, and thus that it "could [have] end[ed]" its decision with its finding of national impairment, *TRO* ¶ 422; App.B-507a the FCC nonetheless found such competition might be possible in "particular instances," *TRO* ¶ 473; App.B-570a.

The FCC determined, however, that the extensive record it had compiled did not enable it to identify these exceptional cases. *TRO* ¶¶ 392, 473; App.B-479a, 570a. It therefore requested that State commissions determine if there were exceptional locations within their States in which those national impairment findings did not apply because of unique geographic or market circumstances. *See, e.g. TRO* ¶¶ 394-418, 486-527; App.B-481a, 580a.

To make these State determinations as "straightforward and predictable" as possible, *TRO* ¶ 196; App.B-272a, the FCC devoted over 70 paragraphs of the *TRO* to detailed instructions to guide the State proceedings. *TRO* ¶¶ 328-340, 394-418, 486-533; App.B-399a, 481a, 589a. In particular, States were to examine whether there were three retail competitors or two wholesale competitors in a particular market self-providing switching or transport facilities, and whether, if not, there was nonetheless evidence showing that self-provisioning would be economic in that market and any operational barriers could be overcome. *See id.* ¶¶ 329, 400, 462-63; App.B-400a, 487a, 552a. The FCC's rules required States to conclude proceedings that make these granular market-by-market findings within nine months. *See id.* ¶ 190; App.B-267a. All five FCC commissioners joined in the decision to involve the States in making these determinations to ensure that the characteristics of specific market did not undermine the agency's national "impairment" findings. *See id.* ¶ 425 n.1300; App.B-509a.

In the decision below, the D.C. Circuit once again vacated the FCC's unbundling regime. *USTA II*, 359 F.3d at 594. This time, the court was not content merely to take aim

at the FCC's impairment standard. Instead, and remarkably, it concluded that the FCC's "subdelegation" of unbundling authority to the States was unlawful. It reasoned that, even in the context of longstanding regulations implementing a scheme of cooperative federalism, "federal agency officials . . . may not subdelegate to outside entities — private or sovereign — absent affirmative evidence of authority to do so." *Id.* at 566; App.A-12a. It then found that without the rule requiring the States to engage in more "granular" unbundling analysis, the FCC's conclusion that competitors were generally impaired without access to ILEC switches, transport and high-capacity loop facilities was insufficiently granular, and thus violated the mandate of *USTA I*, even though the FCC had found there was no evidence in the record to enable it to make more granular determinations. It directed the FCC to adopt new unbundling rules in which it, alone, would make the granular, market-by-market, impairment analysis that the D.C. Circuit had required in *USTA I*. *Id.* at 568-75.

At the same time, in a related ruling the court once again rejected the FCC's "impairment" standard. It found that this time the FCC had failed to take into account any implicit subsidies contained in State retail telephone rates despite the FCC's extensive discussion of this issue at *TRO* ¶¶ 154-169; App.B-232a. In the court's view, the existence of such subsidies could undermine the rationality of unbundling in subsidizing and subsidized rate zones, and could expose the incumbents to an unfair competitive disadvantage. On remand the FCC was therefore instructed to assess in every rate zone the extent to which retail rates made competition through leased facilities economically "wasteful." 359 F.3d at 573.

The court also ruled that the FCC had erred in failing to take account of the extent to which impairment was mitigated as a result of competitor's access to ILEC facilities available pursuant to State and federal service tariffs. This

was so even though the statutory question is whether comeptitors are impaired without access to these facilities at all. 47 U.S.C. § 251 (d)(3); App.C-1051a. Thus, on remand, the FCC was instructed to consider on its own the extent to which the price the ILECs offered wholesale services to competitors through State and federal tariffs make local competition possible without the need for federal "unbundling rules."

As indicated, until the decision under review, the FCC's authority to delegate to the States had not been subject to judicial challenge. And, while the lower court found the FCC's unbundling determinations insufficiently justified, it did not suggest that these determinations were incapable of adequate justification. Nevertheless, the court *vacated* rather than remanded the FCC's unbundling rules, *id.* at 595-95, inexplicably asserting that this harsh result was necessary given the FCC 's "apparent unwillingness to adhere to prior judicial rulings." *Id.* at 595. The industry has thus already been thrust into a state of extreme uncertainty, and, the competition States have worked so hard to create is already beginning to dry up.

Finally, the court upheld the FCC's decision eliminating competitor's access to line sharing. The court found that even if "there is some impairment with respect to the elimination of mandatory line sharing, the Commission reasonably found that other considerations outweighed any impairment." 359 F.3d at 585. The only consideration the court pointed to, however, was that allocation of costs between the high frequency and low frequency portion of the loop would have "some inescapable degree of arbitrariness." *Id.* The court noted the record was ambiguous as to whether line sharing constrained the price of broadband service, *id.*, failing to consider the experience of the States that have seen line sharing bring immeasurable benefits. The result of the FCC's decision is that competitors will often be unable to provide voice service *or* broadband service.

REASONS FOR GRANTING THE WRIT

The court of appeals' sweeping holdings significantly undermines the plan Congress promulgated in the 1996 Act by (i) eliminating any meaningful role for the States in what was intended to be an exercise of cooperative federalism, and threatening the competitive environment State and federal regulators have worked so hard to create. The vigorous scrutiny the court provided to the FCC's national findings of impairment with respect to switching and transport contrast vividly with the minimal scrutiny the court provided the FCC's decision eliminating line sharing. The court's decisions were clearly animated by the view that the Act is intended to permit unbundling in only the narrowest of circumstances, a view directly at odds with the Act itself, which, as this Court has explained is intended to "'uproot' the incumbent LECs' monopoly and to introduce competition in its place." *Trinko*, 124 S. Ct. at 875 (quoting *Verizon*, 535 U.S. at 488). This Court should grant certiorari and reverse.

I. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER THE D.C. CIRCUIT'S DECISION VACATING UNBUNDLING OF SWITCHING AND TRANSPORT.

A. The Lower Court's Decision Conflicts With Decisions of This Court and of Other Courts of Appeals and Threatens Other Cooperative Federalism Regimes.

1. To comply with the D.C. Circuit's mandate of granularity in *USTA I*, the FCC "delegated" to State commissions the task of identifying any "particular instances" where the FCC's national finding of impairment with respect to switching and transport was inapplicable based on precise principles articulated by the FCC. The D.C. Circuit struck down the FCC's "delegation" to State commissions even though, as this Court has explained, the

1996 Act's local competition provisions create "a hybrid jurisdictional scheme" of federal-State partnership. *Verizon*, 535 U.S. at 489; *see also AT&T*, 525 U.S. at 378 n.6, 384. The court held that "federal agency officials . . . may not subdelegate to outside entities – private or sovereign – absent affirmative evidence of authority to do so," even in the context of a regime of cooperative federalism such as that established in the 1996 Act. *USTA II*, 359 F.3d at 566. That holding squarely conflicts with decisions of this Court and of other courts of appeals and would impose a new limit on Congress's and federal agencies' ability to create cooperative arrangements with State regulators.

Applying normal principles of *Chevron* deference under which agencies have discretion to adopt statutory interpretations that are not unambiguously foreclosed by the statute, this Court has held that federal agencies can exercise their rulemaking authority to "subdelegate" the determination of a federal issue to a State tribunal when the statute is one, like the 1996 Act, that is jointly administered by federal and State officials and that expressly gives States a role in making the same or similar determinations. The Court thus recognized in *Wisconsin Department of Health & Family Services v. Blumer*, 534 U.S. 473, 495 (2002), that when dealing with statutes involving "cooperative federalism," the Court has "not been reluctant to leave a range of permissible choices to the States, at least where the superintending federal agency has concluded that such latitude is consistent with the statute's aims." The authority for such subdelegations is to be inferred from Congress's grant of "related" issues to States. *Id.* at 495-97.

In *Batterton v. Francis*, 432 U.S. 416 (1977), for example, the Court upheld HEW's delegation to States of authority to determine certain eligibility criteria for federal benefits. Because States possessed independent statutory jurisdiction over aspects of the general subject matter, the Supreme Court held that Congress's direction that

unemployment be "determined in accordance with standards prescribed by the Secretary'" was sufficient to allow the Secretary "to recognize some local options" and to allow determinations of unemployment to be governed by State standards. *Id.* at 430 (quoting 42 U.S.C. § 607(a). The Court did not require that authority to "subsdelegate" be conferred by Congress in express terms. To the contrary, the Court held that it would "*not lightly infer a congressional intention to preclude*" federal agencies from delegating issues to States and "recognizing legitimate local policies" in jointly administered programs built on cooperative federalism. *Id.* at 431-32.[8] A grant of federal rulemaking jurisdiction was sufficient to create a presumption *in favor* of such delegations. *Id.*; *see also United States v. Mazurie*, 419 U.S. 544, 556-57 (1975).[9] Yet the D.C. Circuit imposed the *opposite* inference in requiring explicit congressional authorization *for every particular subdelegation.*

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[8] *Batterton* involved a provision of the Social Security Act that made eligibility for federal benefits depend in part on whether an individual's father was in a state of "unemployment." *Batterton*, 432 U.S. at 419. Under a prior version of the statute, Congress had explicitly instructed that "unemployment" was to be understood "as defined by the State." *Id.* at 419 n.4. But Congress had stripped the statute of that authorization, and instead instructed that "unemployment" was to be defined by "standards prescribed by the Secretary." *Id.* at 418 n.2. Notwithstanding that Congress had explicitly stripped the statute of the subdelegation provision, the Secretary's regulation dictated that the definition of "unemployed father" come from the States. *Id.* at 417 n.1. The Court upheld the subdelegation, despite recognizing that "the congressional purpose [in the amendment] was to promote greater uniformity," *id.* at 431, because the Court did "not think that this shift of authority from the States to the Secretary required the Secretary to adopt a regulation that precludes any recognition of local policies." *Id.* at 430.

[9] Congress has relied on this presumption, specifically designating decisions that are to remain in federal authorities' hands. *E.g.*, 30 U.S.C. § 1273(c) ("Nothing in this subsection shall be construed as authorizing the Secretary to delegate to the States his duty to approve mining plans on Federal lands.").

The ruling below squarely conflicts with *Batterton* and *Blumer*. There is no question that the 1996 Act is "an exercise in cooperative federalism." *Puerto Rico Tel. Co. v. Telecomm. Reg. Bd.*, 189 F.3d 1, 8 (1st Cir. 1999). The Act gives States express authority to arbitrate and approve interconnection agreements between incumbents and new entrants, and to approve general statements regarding interconnection that apply to all carriers within a State. Indeed, the 1996 Act requires States to "arbitrate" all "open issues" between incumbents and competitors, and in doing so, "to ensure that such resolution . . . meet the requirements of Section 251, including the regulations prescribed by the Commission pursuant to Section 251." 47 U.S.C. § 252(a)-(c), (e), (g); App.C-1046a –1049a, 1051a, 1054a.

By directing States to enforce the obligations of § 251 and any FCC regulations, *Congress* has expressly and directly delegated to States the authority to make unbundling decisions in arbitration proceedings whenever the FCC has been unable to make the determination itself or has made a policy choice that States should apply the general unbundling standard to the particular local conditions in each State.[10] *See also id.*; § 251(f) (authorizing States to suspend or modify statutory rural carrier exemptions from general unbundling obligations, and to exempt small ILECs from FCC-prescribed unbundling obligations) (App.C-1053a). Congress also left untouched the State's historical and primary responsibility to protect the public interest, convenience and necessity by applying local competition telecommunication laws, so long as they were not inconsistent with federal law. *See, e.g.*, 47 U.S.C. §§

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[10] As noted in the statement of the case, § 251 does not impose on the FCC an obligation to enact any regulations other than those "necessary" to "implement the requirements of this section." 47 U.S.C. § 251(d)(1); App.C-1041a. The statute thus makes clear that the FCC is free to leave decisions to the States when these decisions are not necessary.

251(d)(3) (preserving States' authority to enforce their own unbundling regulations) (App.C-1041a); 252(e)(3); (App.C-1051a) 253(b), (App.C-1055a); 261(b)-(c); (App.C-1057a); § 152 note (Pub. L. No. 104-104, § 601(c)).

As *Batterton* and *Blumer* make clear, this "independent jurisdiction over the subject matter," which Congress has expressly conferred on the States, gives the FCC the right to subdelegate to the States. But while acknowledging the States' "independent jurisdiction over the subject matter," *USTA II*, 359 F.3d at 565, the D.C. Circuit nonetheless stripped the States of that jurisdiction. This is inconsistent with *Batterton* and *Blumer*, and this Court should grant this petition to bring the lower court into compliance with this Court's ruling.

2. The court of appeals' decision also conflicts with the decisions of other courts of appeals, which have followed *Batterton*, and that split in the lower courts is an additional reason *certiorari* is warranted. For example, in *Vierra v. Rubin*, 915 F.2d 1372 (9th Cir. 1990), the Ninth Circuit upheld the Health and Human Services Secretary's delegation to the States of the authority to determine the scope of the "good cause" requirement under the federal Work Incentive Program. As long as the State's interpretation of the statute is consistent with Congress', "such a delegation is not impermissible per se." *Id.* at 1377-78. Likewise, in *Southern Pacific Transportation Co. v. Watt*, 700 F.2d 550 (9th Cir. 1983), the Ninth Circuit held that "*[s]ubdelegation of administrative authority to a sovereign entity is not per se improper*" and that "*such a subdelegation*" need not "*rest on express statutory authority.*" *Id.* at 556. The D.C. Circuit's attempt to suggest that there was no delegation in that case notwithstanding, the Ninth Circuit there held that the regulation at issue required an Indian tribe's consent to a right of way grant and thus allowed another sovereign—an Indian tribe—to exempt particular locales from federal regulations. *See id.* at 552.

That is the same role that States have under the Triennial Review Order. The D.C. Circuit's holding on subdelegation thus not only contravenes this Court's own rulings, but adopts a presumption directly contrary to that adopted in the Ninth Circuit—creating a circuit split that will make it impossible for Congress to do its job.

3. Finally, the D.C. Circuit's ruling threatens State authority over other regulated areas, from energy to securities to the environment. Should the ruling stand, the powers of States and State agencies will be at risk whenever a federal agency has delegated the State some authority, whether or not the statute expressly authorizes the delegation. When the statute lacks an express authorization, the impact of the D.C. Circuit's rule is obvious. It threatens, for example, FERC's subdelegation to the States of the authority to set rates for certain purchases of energy, 18 C.F.R. § 292.304(b)(3), and to regulate certain operations, *id.* § 292.101(b)(1)(i)(A), decisions that fall within the powers Congress delegated to FERC, *see* 16 U.S.C. § 824a-3(a) (directing FERC, not State commissions, to issue regulations), not to the States, *see id.* § 824a-3(f) (authorizing States the power only to "implement" FERC's regulations). The ruling threatens SEC regulations that allow California law to define the breadth of certain exemptions to registration requirements, despite Congress's instruction that "the Commission" determine whether exemptions are in the public interest, *compare* 17 C.F.R. § 230.1001(a) (defining exemption by incorporating California law), *with* 15 U.S.C. § 77c(b) (directing SEC to determine whether exemptions are in the public interest).

The D.C. Circuit's ruling also threatens agency delegations even when a statute authorizes or dictates subdelegation, but does so in an ambiguous manner. For even when statutes direct a federal agency to place certain powers in States' hands, the statute is often unclear as to the full extent of that delegation. *Compare, e.g.*, 16 U.S.C. §

1535(a) (instructing cooperation with States "to the maximum extent practicable"), *with* 16 U.S.C. § 1535(c)(1)(B) (requiring determinations of endangered or threatened species status to be made "by the Secretary"), *and with* 16 U.S.C. § 1533(d) (permitting regulations regarding taking of certain species "only to the extent that regulations have also been adopted by such State"); *compare* 21 C.F.R. § 1250.26(e) (delegating certain licensing determinations to State authorities), *with* 42 U.S.C. § 241(a) (permitting Secretary to "encourage, cooperate with, and render assistance to" other public bodies).

Such schemes will be upheld in the Ninth Circuit, but are in doubt—or will be struck down—in the D.C. Circuit. *Certiorari* is warranted to resolve the ambiguity the decision below has created, which until corrected will lead to substantial unnecessary litigation concerning the propriety of many cooperative federalism enactments.

B. The Court Should Grant Certiorari Because the Court Below Has Incorrectly Decided an Important Question of Federal Law.

This petition raises important questions of federal law that this Court should resolve concerning the meaning and effectiveness of the 1996 Act. *See* Supreme Court Rule 10(c). The 1996 Act's local competition provisions "profoundly affect[] a crucial segment of the economy worth tens of billions of dollars," and "fundamentally restructure[] local telephone markets." *IUB*, 525 U.S. 366, 397 (1999) ("*IUB*"). The Supreme Court has twice granted certiorari to review court of appeals decisions striking down FCC regulations implementing the Act's local competition provisions. *See, e.g., Verizon Communications, Inc. v. FCC*, 535 U.S. 467 (2002); *IUB*, *supra*. Here the lower court has struck down the FCC's unbundling rules, rules that are "[c]entral to the scheme of the Act." *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 124 S. Ct. 872, 875 (2004); *see also IUB*, 525 U.S. at 371 (describing unbundling obligations as "foremost" among duties imposed by the 1996 Act).

The practical effect of the lower court's ruling is to eliminate the States from their designated role in bringing competition to local telecommunications markets. Moreover, by imposing extraordinary evidentiary burdens on the FCC before it can unbundle any network element, burdens more akin to constitutional adjudication then to administrative review, and then refusing to allow the FCC to share any of those burdens with willing State commissions, the court has reversed the basic premise of the Act – that it is to build on the unbundling regimes begun by State commissions in an "attempt[] 'to eliminate the monopolies enjoyed by the inheritors of AT&T's local franchises,'" and is, in that respect, "much more ambitious than the antitrust laws." *Trinko*, 124 S. Ct. at 883 (quoting *Verizon*, 535 U.S. at 476). The practical effect of the ruling is to disable the Act's central leasing provisions. And one consequence could well be the severe curtailment of competition in local telecommunications markets. Indeed, two of the primary

competitors that have succeeded in bringing competition to local markets have already announced their intention to pull back in wake of the D.C. Circuit decision. AT&T has announced its intention to stop offering local service to new residential customers in seven States, and, because consumers increasingly desire bundled local and long distance service offerings, to stop offering new long distance service as well. *TR Daily*, June 23, 2004. Z-Tel has similarly announced its intention to stop offering new residential service in eight States. *TR Daily*, June 22, 2004. These competitors likely acted in advance of issuance of new rules because they do not foresee any possibility of favorable rules on remand given the constraints imposed by the D.C. Circuit. These constraints are severe. As the *New York Times* contends, "[b]oth sides in the matter agree that if the Supreme Court does not alter the appeals decision, a central element of the landmark Telecommunications Act of 1996 will effectively be repealed." *See* Bush Backs Off Rule that Eased Phone Line Fees, *New York Times*, June 10, 2004 at A1.

To begin with, the court excluded States from the process. This was so even though Congress constructed the Act based on States' successful unbundling regimes prior to 1996, and understood that enlisting the States' expertise in this area would be critical to the success of the federal regime.[11]

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[11] *See, e.g., Trinko*, 124 S. Ct. at 881-82; *AT&T Corp. v. FCC*, 220 F.3d 607, 616 (2000) (justifying FCC deference to States in § 271 decisions based in part on the "considerable expertise" of States in TELRIC proceedings and the "significant amount of background work" they perform); *In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 16 F.C.C.R. 22781, ¶ 78 (2001) (reasoning that "State commissions may be more familiar than the [FCC] with the characteristics of markets and incumbent carriers within their jurisdiction, and that entry strategies may be more sophisticated in recognizing regional differences"); *Local Competition Order* ¶ 53 (noting that inasmuch as "[v]irtually every decision in this Report and Order

Moreover, the D.C. Circuit's "granularity" rule requires findings based on detailed knowledge of local conditions before any unbundling determination can be made. Indeed, it was precisely because the court imposed this requirement that the FCC delegated to the States the role of identifying any locations in which unique circumstances might make unbundling unnecessary. The FCC on its own cannot possibly make the hundreds of thousands of discrete judgments that the court has now required before it will permit *any* unbundling to occur.[12] And the requirement that

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borrows from decisions reached at the State level," the FCC "therefore encourage[s] States to continue to pursue their own pro-competitive policies"); *In re Application by SBC Communications Inc. et al. Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Servs. in Texas*, 15 F.C.C.R. 18354, ¶ 2 (2000) ("The success of this application is due, in large part, to the extensive review conducted by both the Department of Justice and the Texas Commission."); *In re Application by Bell Atlantic New York for Authorization under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, 15 F.C.C.R. 3953, ¶ 7 (1999) ("We applaud the dedicated efforts of the New York Commission, beginning shortly after passage of the 1996 Act, to work with Bell Atlantic and competitive LECs to ensure that Bell Atlantic would achieve compliance with section 271.").

[12] For example, although there was no evidence in the record that impairments based on hot cuts varied by markets, the court said that it could "imagine the Commission successfully identifying criteria based, for example, on an ILEC's track record for speed and volume in a market, integrated with some projection of the demand increase that would result from witholding of switches as UNEs" in order to identify markets where hot cuts did not cause impairment. 359 F.3d at 570. Such a task, even if possible, would be one of monumental proportions. Moreover, the FCC would have to identify not just variances in impairment based on hot cuts but also other variances. The FCC found that competitors often faced substantial cost disadvantages compared with the incumbents but found that whether these rendered CLEC use of their own switches uneconomic would vary from market to market depending on such factors as the density of customer lines in each individual wire center. For the FCC to determine precisely where such cost disparities cause impairment would alone require thousands of individual judgments.

it do so is inconsistent with the basic tenet of administrative law that agencies can adopt general rules based on conditions that exist in most instances. *See, e.g., Mobil Oil Exploration & Producing Southeast Inc. v. United Distribution Cos.*, 498 U.S. 211, 226-29 (1991). That is precisely what the FCC did here, concluding that unbundling of switching and transport were warranted in the vast majority of circumstances and that it was impossible to identify from the record where this was not the case. *TRO* ¶¶ 320-321, 387, 390-92, 473; App.B-391a, 471a, 477a, 570a.

Similarly, the D.C. Circuit required the FCC to address "narrowly-tailored alternatives" that might eventually resolve the hot cut issue that the FCC found to be one source of impairment. 359 F.3d at 570-71. But the alternatives to which the D.C. Circuit points are not ones ever adopted or even advocated by the ILECs, and the FCC found that the analogous processes some ILECs make available today are not efficient. *TRO* ¶ 474; App.B-571a. Nonetheless, the FCC directed States to consider such processes as possible ways in the future to obviate that portion of impairment caused by hot cuts, and States were in the process of doing so prior to the D.C. Circuit decision. *TRO* ¶¶ 521-24; App.B-630a. The FCC is not best suited on its own to determine whether these processes, which differ from ILEC to ILEC, will obviate impairment in particular markets with vastly different ordering volumes – much less to "imagine" other alternatives the D.C. Circuit will undoubtedly point to if the FCC again finds impairment. 359 F. 3d at 570.

The decision below also requires for the first time an assessment of local retail rates that immensely complicate the task that the FCC must now accomplish on its own. Specifically, the FCC must now consider claims that subsidies allegedly found in particular local retail rates make competition through leased facilities in a particular local rate zone "wasteful" or "synthetic." *USTA II*, 359 F.3d at 573. It must do so in hundreds of different retail zones across the

country for which it is by no means obvious whether subsidies exist at all. It must also consider whether such *competition might impose* too unfair a burden on the incumbents who on this hypothesis are at once forced to assess "high" subsidizing rates for some service, and then face what the court believed to be unfair competition from competitors who leased their facilities at cost-based rates. *Id.* This is so even though this Court recognized that the existence of implicit subsidies should not affect an unbundling analysis, *IUB*, 525 U.S. at 393, and even though the FCC explained at length why such subsidies were irrelevant. *TRO* ¶¶ 154-69; App.B-232a.

On top of those determinations, the FCC now must also consider whether any of the incumbents' State and federal *wholesale* tariffs providing access to services or network elements are an adequate substitute for unbundled network elements provided at the cost-based rates required by the Act. 359 F.3d at 576. But the Act focuses on a different question – whether competitors would be impaired if the incumbents did not provide access to an element at all, and, if the answer is yes, requires incumbents to provide access to the elements at cost-based rates. 47 U.S.C. § 251(d)(3); App.C-1041a. As the FCC has explained, this is so because otherwise, the ILECs would have "unilateral power to avoid" the cost-based pricing requirements "simply by voluntarily making elements available at some higher price." *TRO* ¶ 102; App.B-182a. The D.C. Circuit's ruling will also post vast administrative difficulties. The FCC will be forced to attempt to analyze the hundreds of tariffed services.

Of course the States themselves are in by far the best position to evaluate their retail and wholesale rate structures, if that is to be required. And the kind of complex rate cases the court evidently contemplates would be difficult enough for each State to conduct in advance of any unbundling determination. It plainly would be impossible for the FCC to make these calculations within any reasonable period of

time. Thus, the court's ruling will effectively eliminate the FCC's ability, in the face of contrary prior rulings, to create a detailed enough record sufficient to justify unbundling of certain key in *any market* on the terms required by the court.

That is not an acceptable result to State commissions, it is not an acceptable result under the Act, and it is a result this Court should review. States have expended extraordinary efforts to open their local telecommunications markets to competition. Indeed, under § 271 of the Act virtually every State has held extensive proceedings to evaluate whether its local market is sufficiently open to recommend to the FCC that the incumbent be permitted to offer long-distances services in the State. And at this point every State to consider the question has found that its local market is sufficiently open, *based on the competition made possible by the leasing of unbundled network elements.*[13] The FCC has

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[13] *See, e.g., In re the Commission's Own Motion, To Consider SBC's, f/k/a Ameritech Michigan, Compliance with the Competitive Checklist in Section 271 of the Federal Telecommunications Act of 1996*, No. U-12320, at 3 (Mich. Pub. Serv. Comm'n Jan. 13, 2003), *available at http://www.cis.state.mi.us/mpsc/orders/comm/2003/u12320m271report.pdf* (confirming the importance of unbundling for introducing and maintaining local competition); *Investigation Into Ameritech Wisconsin's Unbundled Network Elements*, No. 6720-TI-161, at 22 (Pub. Serv. Comm'n of Wis. March 22, 2002), *available at* http://psc.wi.gov/pdffiles/ord_notc/4534.PDF (ordering unbundling, under federal and State law of advanced services elements because it "serves the public interest and promotes competition by facilitating the provision of advanced services by CLECs who would otherwise be impaired without access to these facilities"); *In re Petition of MCImetro Access Transmission Servs., LLC for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Ameritech Ohio*, No. 01-1319-TP-ARB, at 51 (Pub. Utilities Comm'n of Ohio Nov. 7, 2002), *available at* http://dis.puc.state.oh.us/CMPDFs/DNTZBEXOATKSDS21.pdf (concluding that "the continuation of the availability of Ameritech's Broadband Offering for the term of Ameritech/MCIm agreement will be in the public interest, since it will allow MCIm to compete effectively with Ameritech for advanced services").

then permitted this long-distance competition, based heavily on the recommendations of the States, just as the statute contemplates. The results have been promising, with multiple competitors competing in most markets in most States for both local and long-distance customers. But now the court has excluded the States, and left the FCC with an impossible task. This will undermine the competition Congress intended and State and federal regulators have jointly promoted.

II. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER THE FAULTY ANALYSIS OF LINE-SHARING.

The court below upheld the FCC's line-sharing determinations. In performing its impairment analysis for line-sharing, the FCC makes a blanket national finding that "cable modem service is the most widely used means by which mass-market obtains broadband service." *TRO* ¶262; App.B-331a. This analysis ignores the state of competitive impairment in particular markets. Indeed, the findings are directly contradicted by the California Commission's finding that there is a lack of affordable, ubiquitously available broadband service options provided by alternative cable modem, satellite and wireless technologies in California. California Public Utilities Commission Decision D.03-01-077, *mimeo* at 14. The FCC noted that cable modem service is provided over nine million lines, which is approximately 57 % of all high-speed lines. *TRO* ¶262, n.777; App.B-331a. However, in California, according to FCC statistics, DSL remains the leading form of broadband access in California.[14] Further, one-third of all Californians live in cities where DSL is the only broadband service choice. *Id.*

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[14] *See, High-Speed Services for Internet Access: Status as of December 31, 2002*, Industry Analysis and Technology Division of the Wireline Competition Bureau, Federal Communications Commission, at Table 7 (June 2003).

III. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE FCC'S PRICING PROPOSAL FOR DELISTED ELEMENTS IS CONSISTANT WITH THE ACT.

Section 252(a)(1) (App.C-1046a) makes clear that interconnection agreements must specify the rates and the specific elements to be provided. While the Supreme Court found in *Iowa, supra*, that the Act is "not a model of clarity," two things *were* clear: (1) when interconnection agreements are negotiated, they are to be submitted to State commissions for approval, but if negotiations fail, "either party can petition the State commission . . . to arbitrate open issues." 525 U.S. at 373-374, and (2) with respect to rates established in such arbitrations "[i]t is the States that will . . . determine[] the concrete result in particular circumstances." *Id.* at 384. The rationale underlying certain determinations in the TRO upheld by the Court below are at odds with these pronouncements.

The FCC required the Bell Operating Companies ("BOCs") subject to §271 to continue to make available access to certain elements as a checklist item even if access to them is not "impaired" under §252. The FCC claims such access should be at "just and reasonable rates" under 47 U.S.C. §§201-202, *TRO* ¶662; App.B-763a, instead of using TELRIC pricing. Significantly, the FCC also suggests whether the BOCs have complied with those sections, including the pricing requirement, is to be determined *by the FCC* "in an enforcement proceeding brought pursuant to section 271(d)(6)." *TRO* ¶664; App.B-764a. Those determinations are inconsistent with the Congressionally-mandated State arbitration scheme and the plain language of the Act. Section 252(c)(2) (App.C-1049a) says State's "establish any rates for . . . elements." Congress intended

that provision, not §§201-202,[15] to govern pricing of elements. Nothing in the Act allows a BOC to establish rates for elements subject to the FCC's review in an interconnection agreement that goes to arbitration. *States* establish rates when the parties cannot agree, subject to review by the *federal district courts* pursuant to §252(e)(6) (App.C-1053a) or State courts, *not the FCC*. There simply is no basis in the statute for the FCC to write *State commissions* out of the rate-setting process and these *courts* out of the review process.

CONCLUSION

Based on the forgoing, Petitioners respectfully request grant of the writ of certiorari.

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June 30, 2004

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[15] Nothing in §§ 201-202 provides the FCC with authority to either (1) set rates of elements in a disputed interconnection agreement or in freely negotiated agreements subject to State approval, or (2) require States to use a different standard in those arbitrations.

Supreme Court, U.S.
FILED
JUL 20 2004
OFFICE OF THE CLERK

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No. 04-12

In the Supreme Court of the United States

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AND THE ARIZONA CORPORATION COMMISSION,
Petitioners,
v
UNITED STATES TELECOM ASSOCIATION, *ET AL.*,
Respondents.

On Petition For Writ of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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QUESTIONS PRESENTED

1. Whether, in administering a statute that is an exercise in cooperative federalism, a federal agency is barred from asking States to make additional determinations in accord with substantial guidance provided by the agency where that Act (§ 251(d)(3)) expressly reserves to States authority to make independent unbundling determinations.

2. Alternatively, assuming the Court was correct in its "subdelegation" analysis, whether *vacatur* was proper given that *Congress* has expressly and directly delegated to States the authority to make unbundling decisions.

PARTIES TO THE PROCEEDING

Petitioners are the National Association of Regulatory Utility Commissioners (NARUC), a quasi-governmental corporation organized under the laws of the District of Columbia with its principle place of business in Washington, D.C., and the Arizona Corporation Commission, a State governmental entity.

Respondent here is the Michigan Public Service Commission, a state regulatory commission.

Other parties to the District of Columbia Circuit proceeding are identified in the caption of the decision below. (See App. B66a *et seq.*)[1]

[1] NARUC/Arizona, in their petition, cited to the appendices filed by AT&T *et al* in Docket No. 04-15 seeking review of the same D.C. Circuit decision. Accordingly, all appendix cites in this response are to the appendix filed by AT&T *et al* in No. 04-15.

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OPINIONS BELOW

The opinion of the court of appeals (App. A-1a *et seq*) is reported in *United States Telecom Ass'n v FCC*, 359 F3d 554, 594 (DC Cir, 2004) (*USTA II*). The Federal Communications Commission's order (App. B-66a *et seq*) is reported at 18 FCC Rcd 16,978, and an *Errata* correcting the order is reported at 18 FCC Rcd 19,020.

JURISDICTION

The court of appeals opinion and judgment were issued on March 2, 2004. This Court has jurisdiction under 28 USC 1254(1).

STATUTORY PROVISIONS INVOLVED

Statutory provisions are from the Telecommunications Act of 1996, Pub L 104-104, 110 Stat 56, and are reproduced at App. C-1036a *et seq*.

STATEMENT OF THE CASE

With the enactment of the Telecommunications Act of 1996, 47 USC 151 *et seq* (FTA or Act) Congress moved toward a national policy of competition in the telephone market, enacting a statutory scheme that provides a role for both the Federal Communications Commission and State regulators. The 1996 Act is "an exercise in what has been termed cooperative federalism." *Puerto Rico Tel Co v Telecom Reg Bd of Puerto Rico*, 189 F3d 1, 8 (1st Cir, 1999). It required the FCC to work together with State agencies to open local markets to competition. *See, e.g., Verizon Communications Inc v Law Offices of Curtis V. Trinko, LLP*, 540 US ___; 124 S Ct 872, 876, 882 (2004) (discussing specific examples of the FCC and State commissions working cooperatively to implement the pro-competitive goals of the 1996 Act). The 1996 Act has generated numerous challenges to the manner in which its provisions are implemented. Notwithstanding a perceived lack of clarity in the Act on crucial provisions, this Court has nonetheless confined its enforcement to

the "clear limits" of the 1996 Act, acknowledging that Congress was "well aware" of the ambiguities it chose to produce in the 1996 Act. As this Court concluded in *AT&T Corp v Iowa Utilities Bd,* 525 US 366, 397 (1999):

> It would be gross understatement to say that the 1996 Act is not a model of clarity. It is in many important respects a [model of ambiguity] or indeed even [self-contradiction]. That is mot unfortunate for a piece of legislation that profoundly affects a crucial segment of the economy worth tens of billions of dollars. The 1996 Act can be read to grant (borrowing a phrase from incumbent GTE) "most promiscuous rights" to the FCC vis-à-vis the state commissions and to competing carriers vis-à-vis the incumbents – and the Commission has chosen in some instances to read it that way. **But Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency, see *Chevron*, 467 U.S. at 842-843. We can only enforce the clear limits that the 1996 Act contains**, which in the present cases invalidate only Rule 319. [Emphasis added.]

A key provision of the Act is 47 USC 251(c)(3) which requires the "unbundling," or sharing, of the incumbent's network facilities, or "elements." App. C-1039a. That provision adopts the rules already in place in many States to bring competition to local markets by requiring sharing of network infrastructure. It also requires that both the FCC and State regulators implement the Act's unbundling regime.

§ 251(d) of the Act (App. C-1041a) govern implementation, including the unbundling requirements specified in § 251(c). (App. C-1038a). Congress generally did not require the FCC to issue regulations implementing any specific subsection of § 251's market-opening provisions. It did, however, require the FCC to "complete all actions necessary to establish regulations to implement the requirements of [§ 251]" within six months. 47

USC 251(d)(1); App. C-1041a. By requiring the FCC to "complete all actions *necessary* to establish regulations," rather than requiring the FCC to "complete *all* regulations," Congress appropriately contemplated a regime in which the FCC would share regulatory responsibilities. Congress also required that, in those circumstances where the FCC did set "access standards" to "determine[] what network elements should be made available" under the Act's leasing provision, it "shall consider, at a minimum, whether" competitors would be "impaired" without access to the incumbents' non-proprietary facilities. § 251(d)(2); App. C-1041a.

Congress also expressly preserves State local competition law, specifically providing that the FCC "*shall not preclude* the enforcement of any regulation, order, or policy of a State commission" that establishes unbundling obligations of local carriers, is consistent with the requirements of § 251, and "does not substantially prevent implementation of the requirements of this section and the purposes of this part." 47 USC 251(d)(3) (emphasis added). (App. C-1041a).

Moreover, under the Act it is the States, not the FCC, that are generally the arbiters of the terms that govern inter-carrier relationships. The terms of the ILECs' leasing arrangements with its competitors are set through voluntary negotiations. § 252(a)(1); App. C-1046a. If those negotiations fail, Congress designated State commissions, not the FCC, in the first instance to set the actual interconnection agreement terms that govern the leasing required by federal and State law. § 252(b); App. C-1047a. In setting those terms, State commissions are required to follow FCC regulations to the extent they govern resolution of a disputed matter. *See* 47 USC 252(c)(1); (App. C-1049a); 252(e)(2)(B); (App. C-1051a); *AT&T Corp v Iowa Utilities Bd*, 525 US 366, 385, n 10 (1999). To the extent the disputed matter is not subject to any FCC rule, however, the States apply the unbundling and other requirements of the Act itself, as well as their own law, to the extent that they are consistent with the purposes underlying the Act. State commissions, "guided by the

provisions of the Act and by the concomitant FCC regulations," are directed under the federal scheme to "exercise their expertise concerning the needs of the local market and local consumers." *Puerto Rico Tel Co*, 189 F3d at 14. *See, e.g.*, 47 USC 252(e)(3); (App. C-1052a); 253(b) (App. C-1055a); 261(b)-(c) (App. C-1057a); § 152 note (Pub L 104-104, § 601(c)).

The FCC unbundling regulations at issue here were the result of the FCC efforts to comply with the court of appeals' mandate in *United States Telecom Ass'n v FCC*, 290 F3d 415, 421-28 (DC Cir, 2002) ("*USTA I*"), *cert den* 538 US 940 (2003). According to the court, the FCC's nationwide rules were not carefully-enough calibrated to assure that unbundling would occur only in the specific locations in which there was an administrative record supporting a finding of impairment. *USTA I*, 290 F3d at 422-26. The court criticized the FCC for not adopting a rigorous definition of impairment. *Id* at 426-28.

In the decision below, the D.C. Circuit once again vacated the FCC's unbundling regime. *USTA II, supra*. The court did not limit itself to the FCC's impairment standard. Instead, it concluded that the FCC's "subdelegation" of unbundling authority to the States was unlawful. It reasoned that, even in the context of longstanding regulations implementing a scheme of cooperative federalism, "federal agency officials . . . may not subdelegate to outside entities — private or sovereign — absent affirmative evidence of authority to do so." *Id* at 566; App. A-12a. It directed the FCC to adopt new unbundling rules in which it, alone, would make the impairment analysis that the D.C. Circuit had required in *USTA I*. *Id* at 568-75.

The court *vacated*, rather than remanded, the FCC's unbundling rules, *Id* at 595-95, asserting that this extreme remedy was necessary in light of the FCC's "apparent unwillingness to adhere to prior judicial rulings." *Id* at 595. The industry has thus been thrown into a state of extreme uncertainty, and the competitive telecommunications environment States have worked for almost a decade to create is in jeopardy.

Pursuant to U.S. Supreme Court Rule 12.6, the Michigan Public Service Commission files this response supporting the Petitioners. This Court should grant certiorari and reverse the decision below because that decision conflicts with decisions of this Court and other courts of appeals, because it effectively disables critical provisions of an "unusually important legislative enactment," *Reno v ACLU*, 521 US 844, 857 (1997), the Telecommunications Act of 1996, and the scheme of "cooperative federalism" that is the cornerstone of the 1996 Act.

REASONS FOR GRANTING THE WRIT

In the decision below, the D.C. Circuit vacated portions of the FCC's *Triennial Review Order* ("*TRO*")[2] requiring incumbent local exchange carriers (ILECs) to share components of their local networks with competitors, and establishing extensive federal standards to guide State commissions in determinations of which unbundled network components do *not* have to be shared. The lower court found that States can play no role in these determinations, and that the FCC's findings are inadequate standing alone. This D.C. Circuit decision jeopardizes competition in the local exchange market that has developed over the last decade. During this time, State commissions have expended considerable time and resources to introduce, maintain and encourage competitive markets. Although States have significantly assisted in bringing competition to local markets, the Court's decision effectively limits the States' future ability to play a meaningful role in the move toward competition. The FCC is ill-equipped to fully implement the provisions of the 1996 Act without the States' assistance. The lower court decision effectively eliminates many of the Act's critical leasing provisions. It also flies in the face of the cooperative scheme established by the Act and the express authority given to States to make unbundling determinations.

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[2] *In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCCR 16798 (2003), corrected by *Errata*, 18 FCCR 19020 (2003) ("*TRO*").

Certiorari should be granted because the court of appeals' holding significantly undermines the plan Congress enacted in the 1996 Act by eliminating any meaningful role for the States in what was intended to be an exercise of "cooperative federalism." It thus threatens the competitive environment State and federal regulators have worked for almost ten years to create. The Court of Appeals' decision is inconsistent with the Act itself, which, as this Court has explained, is intended to "'uproot' the incumbent LECs' monopoly and to introduce competition in its place." *Verizon Communications, Inc v Law Offices of Curtis, V. Trinko, supra* at 875 (quoting *Verizon Communications, Inc v FCC*, 535 US 467, 488 (2002)). This Court should grant certiorari and reverse.

I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE LOWER COURT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND OF OTHER COURTS OF APPEALS AND THREATENS THE PLAN FOR COOPERATIVE FEDERALISM EMBODIED IN THE FEDERAL TELECOMMUNICATIONS ACT OF 1996.

To comply with a previous ruling by the D.C. Circuit in *USTA I*, the FCC had delegated to state commissions the identification of "particular instances" when the FCC's finding of impairment regarding switching any transport was inapplicable. These State Commission determinations were to be based on precise principles provided by the FCC. The D.C. Circuit struck down the FCC's "delegation" to State commissions even though, as this Court has explained, the 1996 Act's local competition provisions create "a hybrid jurisdictional scheme" of federal-State partnership. *Verizon Communications, Inc v FCC, supra*, *see also AT&T Corp v Iowa Utilities Board, supra* at 378, n 6. That court held that "federal agency officials . . . may not subdelegate to outside entities – private or sovereign – absent affirmative evidence of authority to do so," even in the context of a regime of cooperative federalism such as that established in the 1996 Act.

USTA II, 359 F3d at 566. Such a holding squarely conflicts with decisions of this Court and of other courts of appeals and would impose a new limit on Congress' and federal agencies' ability to create cooperative arrangements with State regulators.

This Court, applying the deference articulated in *Chevron U.S.A., Inc v Natural Resources Defense Council, Inc, et al*, 467 US 837 (1984), has determined that federal agencies can exercise their rulemaking authority to "subdelegate" the determination of a federal issue to a State tribunal when the statute is one, like the 1996 Act, that is jointly administered by federal and State officials and that expressly gives States a role in making the same or similar determinations. The Court thus recognized in *Wisconsin Dep't of Health & Family Services v Blumer*, 534 US 473, 495 (2002), that, when dealing with statutes involving "cooperative federalism," the Court has "not been reluctant to leave a range of permissible choices to the States, at least where the superintending federal agency has concluded that such latitude is consistent with the statute's aims." The authority for such subdelegations is to be inferred from Congress's grant of "related" issues to States. *Id* at 495-97.

The 1996 Act is "an exercise in cooperative federalism." *Puerto Rico Tel Co v Telecomm Reg Bd*, 189 F3d at 8. The Act expressly assigns to the States the authority to arbitrate and approve interconnection agreements between incumbents and new entrants, and to approve general statements regarding interconnection that apply to all carriers within a State. The 1996 Act requires States to "arbitrate" all "open issues" between incumbents and competitors, and in doing so, "to ensure that such resolution . . . meet the requirements of Section 251, including the regulations prescribed by the Commission pursuant to Section 251." 47 USC 252(a)-(c), (e), (g); App. C-1046a –1049a, 1051a, 1054a.

Congress has thus expressly and directly delegated to States the authority to make unbundling decisions in arbitration proceedings whenever the FCC has been unable to make the

determination itself or has made a policy choice that States should apply the general unbundling standard to the particular local conditions in each State. Congress also preserved in the 1996 Act the State's historical and primary responsibility to protect the public interest, convenience and necessity by applying local competition telecommunication laws, so long as they were not inconsistent with federal law. *See, e.g.*, 47 USC 251(d)(3) (preserving States' authority to enforce their own unbundling regulations) (App. C-1041a), 252(e)(3); (App. C-1051a), 253(b); (App. C-1055a), 261(b)-(c); (App. C-1057a), § 152 note (Pub L 104-104, § 601(c)).

Consistent with the language of the 1996 Act, and its purpose of promoting competition, a State role in making impairment decisions to determine network element access, made in accordance with FCC principles, is consistent with the intent of Congress in enacting the FTA. The FCC provision of a methodology for states making these impairment determinations was consistent with § 251 of the Act, and the Court of Appeals erred in holding otherwise.

The unique character of the 1996 Act, threatened by the lower court's opinion, was underscored by this Court in *Verizon*, 535 US at 489:

> For the first time, Congress passed a rate setting statute with the aim not just to balance interests between sellers and buyers, but to reorganize markets by rendering regulated utilities' monopolies vulnerable to interlopers, even if that meant swallowing the traditional federal reluctance to intrude into local telephone markets. The approach was deliberate, through a hybrid jurisdictional scheme with the FCC setting a basic, default methodology for use in setting rates when carriers fail to agree, but leaving it to state utility commissions to set the actual rates.
>
> While the Act is like its predecessors in tying the methodology to the objectives of "just and reasonable"

> and nondiscriminatory rates, 47 U.S.C. § 252(d)(1), it is radically unlike all previous statutes in providing that rates be set "without reference to a rate-of-return or other rate based proceeding," § 252(d)(1)(A)(i). The Act thus appears to be an explicit disavowal of the familiar public-utility model of rate regulation (whether in its fair-value or cost-of-service incarnations) presumably still being applied by many States for retail sales, see *In re Implementation of Local Competition in Telecommunications Act of 1996,* 11 FCC Rcd 15499, 15857 P704 (1996) (First Report and Order), in favor of novel rate setting designed to give aspiring competitors every possible incentive to enter local retail telephone markets, short of confiscating the incumbents' property.

This "hybrid jurisdictional scheme" has been severely undermined by the Court of Appeals' decision below and, rather than ensuring telecommunications competitors "every possible incentive" to enter local retail telephone markets, the Court of Appeals has – by foreclosing a state role on impairment findings and vacating of FCC rules on impairment – contributed significantly to slamming the door on competition.

CONCLUSION

The NARUC/Arizona Corporation Commission's Petition for a Writ of Certiorari should be granted.

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Dated: July, 2004

Supreme Court, U.S.
FILED
SEP 1 - 2004
OFFICE OF THE CLERK

(3) (4) (2)

Nos. 04-12, 04-15 and 04-18

In the Supreme Court of the United States

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, ET AL., PETITIONERS

v.

UNITED STATES TELECOM ASSOCIATION, ET AL.

AT&T CORP., ET AL., PETITIONERS

v.

UNITED STATES TELECOM ASSOCIATION, ET AL.

CALIFORNIA, ET AL., PETITIONERS

v.

UNITED STATES TELECOM ASSOCIATION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, seeks to bring competition to local telephone markets in part by requiring incumbent local exchange carriers (ILECs) to give competitors access to elements of the ILECs' networks "on an unbundled basis." 47 U.S.C. 251(c)(3). In determining what network elements an ILEC must make available to new entrants, the Federal Communications Commission is directed to consider, "at a minimum," whether the lack of access to a particular nonproprietary element would "impair" the ability of a new entrant to provide service. 47 U.S.C. 251(d)(2). The questions presented in this case are:

1. Whether the Commission reasonably determined under Section 251 not to require ILECs to unbundle certain loop facilities that allow the provision of broadband service.

2. Whether the court of appeals correctly determined, with respect to broadband and other network facilities that the Commission has not required to be unbundled under Section 251, that petitioners' contentions concerning preemption of state unbundling requirements are not ripe for judicial review.

3. Whether the court of appeals erred in vacating Commission rules requiring the unbundling, subject to state commission determinations, of mass-market switching and certain dedicated transport facilities under Section 251(c)(3).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-65a[1]) is reported at 359 F.3d 554. The order of the Federal Communications Commission (Pet. App. 66a-1035a) is

[1] All references to the Pet. App. are to the appendix to the petition for a writ of certiorari in No. 04-15.

reported at 18 F.C.C.R. 16,978, as corrected by *Errata*, 18 F.C.C.R. 19,020.

JURISDICTION

The judgment of the court of appeals was entered on March 2, 2004. On May 24, 2004, the Chief Justice extended the time within which to file a petition for a writ of certiorari in No. 04-12 to and including June 30, 2004. On May 25, 2004, the Chief Justice extended the time within which to file a petition for a writ of certiorari in Nos. 04-15 and 04-18 to and including June 30, 2004, and all the petitions were filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. With the passage of the Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56, Congress "ended the longstanding regime of state-sanctioned monopolies" in local telephone service. *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999) (*AT&T*). The 1996 Act "fundamentally restructures local telephone markets" by imposing on incumbent local exchange carriers (ILECs) "a host of duties intended to facilitate market entry" by aspiring competitors. *Ibid.* The Act imposes on each ILEC an "obligation * * * to share its network with competitors" under the terms prescribed by 47 U.S.C. 251(c). *AT&T*, 525 U.S. at 371. Under Section 251(c), a competitive local exchange carrier (CLEC) may use the ILEC's network in three ways: "It can purchase local telephone services at wholesale rates for resale to end users; it can lease elements of the incumbent's network 'on an unbundled basis'; and it can interconnect its own facilities with the incumbent's network." *Ibid.*

The central network-sharing provision of the 1996 Act is Section 251(c)(3), which provides that a new entrant may "access" (*i.e.*, lease) "elements" of an incumbent's network on an "unbundled basis" under rates, terms, and conditions that are just, reasonable, and nondiscriminatory. 47 U.S.C. 251(c)(3). Examples of "network elements" include "the local loops (wires connecting telephones to switches), the switches (equipment directing calls to their destinations), and the transport trunks (wires carrying calls between switches) that constitute a local exchange network." *AT&T*, 525 U.S. at 371.

Congress required that the Federal Communications Commission was to complete the task of adopting regulations to implement the requirements of Section 251 within six months after enactment of the 1996 Act. 47 U.S.C. 251(d)(1). For purposes of "determining what network elements should be made available" under Section 251(c)(3), the 1996 Act directs the Commission to "consider, at a minimum, whether * * * access to such network elements as are proprietary in nature is *necessary*," and whether, as to non-proprietary elements, "the failure to provide access to such network elements would *impair* the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." 47 U.S.C. 251(d)(2) (emphasis added). The statute does not define or otherwise elaborate on the terms "necessary" and "impair." This case concerns only non-proprietary elements, and the "impair" standard is thus at issue.

Under procedures prescribed in the 1996 Act, the specific rights and duties of incumbents and competing carriers are set forth in "interconnection agreements." If an incumbent and a competing carrier are unable to reach a negotiated agreement, the 1996 Act provides

that the relevant state commission shall "arbitrate" all "open issues" between the parties by applying the "requirements of section 251 of the Act, including the regulations" adopted by the Federal Communications Commission. 47 U.S.C. 252(c).

2. a. In August 1996, the FCC adopted initial rules for implementing the local competition provisions of the 1996 Act. *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 F.C.C.R. 15,499 (1996) (*Local Competition Order*). The FCC designated all components of the incumbents' networks as network elements and required incumbents to lease to their competitors preassembled combinations of some or all of those elements. It also required that rates for network elements be set under the FCC's "total element long-run incremental cost" (TELRIC) pricing standard. On petitions for review, the United States Court of Appeals for the Eighth Circuit affirmed some parts of the *Local Competition Order* and reversed others. *Iowa Utils. Bd.* v. *FCC*, 120 F.3d 753 (1997). On certiorari, this Court affirmed in part and reversed in part. *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366 (1999).

The Court affirmed the FCC's general authority to adopt rules governing the States' participation in the administration of the 1996 Act, including rules establishing a methodology that the States would apply when setting the prices of unbundled network elements. *AT&T*, 525 U.S. at 377-385. The Court also affirmed several aspects of the FCC's unbundling rules, including various rules that allowed CLECs to "lease a complete, preassembled network" at cost-based rates. *Id.* at 392-395. At the same time, the Court held that the FCC had not adequately given effect to the "necessary" and "impair" standards in adopting its rules

governing unbundled access under Section 251(d)(2). *Id.* at 387-392. The Court held that the Commission had erroneously read Section 251(c)(3) as requiring incumbents to "provide all network elements for which it is technically feasible to provide access" and had treated Section 251(d)(2) as merely authorizing the FCC to "create isolated exemptions from some underlying duty to make all network elements available." *Id.* at 391 (citation omitted). The Court further held that the Commission had erred in refusing to consider "the availability [to new entrants] of elements outside the incumbent's network" and in treating any cost or quality difference—no matter how trivial—as conclusive evidence of impairment. *Id.* at 389-390. While acknowledging that the Commission was not bound to any particular interpretation of the terms of Section 251(d)(2), the Court held that "the Act requires the FCC to apply *some* limiting standard, rationally related to the goals of the Act." *Id.* at 388.

Responding to this Court's decision in *AT&T*, the Commission revised its rules in 1999 to adopt a new interpretation of the statutory impairment standard. *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 F.C.C.R. 3696 (1999) (*Remand Order*). Under the revised interpretation, a competing carrier was deemed to be "impaired" with respect to a particular element if, "taking into consideration the availability of alternative elements outside the incumbent LEC's network * * *, lack of access to that element materially diminishes a requesting carrier's ability to provide the services it seeks to offer." 47 C.F.R. 51.317(b)(1). Under that standard, the FCC removed some elements from the national list (directory and operator services, packet switching, and switching to serve certain large "enter-

prise" customers), but maintained access requirements that allowed competing carriers who do not have their own network facilities to obtain a combination of loops, transport, and switching that could be used to serve "mass market" (*i.e.*, residential and small business) customers. Numerous ILECs filed petitions for review in the D.C. Circuit challenging the FCC's revised unbundling rules.

b. While those petitions were pending, this Court rejected the ILECs' challenge to the FCC's TELRIC rules for pricing unbundled elements in *Verizon Communications Inc.* v. *FCC*, 535 U.S. 467 (2002). The Court in *Verizon* addressed claims that were central to the incumbents' simultaneous D.C. Circuit challenge to the scope of unbundling—*i.e.*, that making combinations of all unbundled elements available at TELRIC rates "may simulate the competition envisioned by the Act but does not induce it" and "perversely creates incentives against competition in fact." *Id.* at 503. This Court rejected those claims, finding that the evidence did not support the argument that TELRIC rates would "stifle" investment incentives, *id.* at 517 n.33, and concluding that, in any event, the statute gave the FCC discretion to choose "to induce [potential entrants] to compete in less capital-intensive facilities with lessened incentives to build their own bottleneck facilities." *Id.* at 510.

c. Shortly after this Court issued its *Verizon* decision addressing TELRIC pricing, the D.C. Circuit granted the ILECs' petitions for review of the FCC's 1999 *Remand Order*. *United States Telecom Ass'n* v. *FCC*, 290 F.3d 415 (2002) (*USTA I*), cert. denied, 538 U.S. 940 (2003). The court of appeals recognized "the extraordinary complexity of the Commission's task," and acknowledged that Congress "gave no detail as to

either the kind or degree of impairment" that would justify mandatory unbundling. *Id.* at 421-422. Nonetheless, the court of appeals remanded the Commission's rules for further consideration.

The D.C. Circuit determined that the Commission's network unbundling rules were impermissibly overbroad in three respects. First, the court of appeals took issue with the Commission's decision "to adopt a uniform national rule" requiring unbundling "without regard to the state of competitive impairment in any particular market." *USTA I*, 290 F.3d at 422. The court concluded that the Commission should have adopted "a more nuanced concept of impairment" that (among other things) accounted for the effects of any existing implicit universal service subsidies. *Id.* at 422-423. Second, although the court recognized that "any cognizable competitive 'impairment' would necessarily be traceable to some kind of disparity in cost" between obtaining an unbundled network element and obtaining a reasonable substitute for the element, it faulted the Commission for relying on cost disparities that may be "faced by virtually any new entrant in any sector of the economy, no matter how competitive the sector." *Id.* at 426. Lastly, the court of appeals set aside the Commission's decision to allow CLECs to lease the high-frequency portion of ILECs' copper loops to provide broadband service (a practice known as "line-sharing"), because the agency "failed to consider the relevance of competition in broadband services coming from cable (and to a lesser extent satellite)." *Id.* at 428.

The United States and the FCC did not ask this Court to review the D.C. Circuit's decision overturning the *Remand Order*. In its response to a certiorari petition filed by CLECs, the government agreed that the *USTA I* decision was "erroneous for many of the

reasons set forth in the petition," that the decision was "in significant tension with this Court's reasoning in *Verizon* and *AT&T*," and that the court of appeals did not accord "appropriate deference to the FCC's reasonable implementation of a complex statute." Fed. Resp. Br. at 14, *WorldCom, Inc.* v. *United States Telecom Ass'n*, cert. denied, 538 U.S. 940 (2003) (No. 02-858). But the government explained that it had decided not to seek review of the D.C. Circuit's decision because the FCC was already in the process of completing its so-called "Triennial Review" proceeding, in which the Commission "as a matter of discretion" had undertaken to engage in "much" of the analysis required by *USTA I*. Fed. Resp. Br. at 17. The Court denied certiorari. 538 U.S. 940 (2003).

3. In August 2003, the Commission issued its *Triennial Review Order*, the agency decision now on review. Pet. App. 66a-1035a. In the *Triennial Order*, the Commission stated that it would find competitive impairment and require unbundling "when lack of access to an incumbent LEC network element poses a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic." *Id.* at 161a. The Commission stated that it would make this determination by asking "whether all potential revenues from entering a market exceed the costs of entry, taking into consideration any countervailing advantages that a new entrant may have." *Ibid.*

Applying its revised impairment standard, the FCC significantly cut back the scope of unbundling that it had mandated under the 1999 *Remand Order*. Among other things, the Commission substantially curtailed mandatory unbundling of the broadband capabilities of ILECs' fiber loops serving residential customers. Pet.

App. 341a-362a. It also decided to phase out line sharing requirements that allowed CLECs to lease the high-frequency portion of copper loops in order to provide broadband services to their customers. *Id.* at 326a-332a. To reduce market disruption, however, the Commission created a three-year transition period for eliminating line sharing. During the first year of the transition, CLECs could obtain new line sharing arrangements by paying 25% of the full loop rate. The following year, the line sharing rate would increase to 50% of the loop rate. Then, in the final year of the transition, the rate for new line sharing arrangements would increase to 75% of the loop rate. *Id.* at 336a-337a.

At the same time, the Commission found that competitive conditions justified the continued unbundling of other elements under Section 251(c)(3). In particular, the Commission maintained unbundling requirements for switches used to serve the mass market (*i.e.*, residential and small business customers) and for dedicated transport facilities below a certain capacity level. Pet. App. 464a-465a, 477a-478a, 549a-551a. In combination with unbundled loops, the availability of unbundled switches and transport facilities enabled CLECs to continue to serve residential users by means of a "platform" of elements obtained entirely from ILECs.

The FCC found that CLECs were generally impaired absent unbundled mass-market switching because they could not use their own switches without obtaining expensive, operationally difficult, and disruptive manual "hot cuts" to rewire connections between the loops used by mass market customers and a CLEC switch. Pet. App. 554a-556a. The Commission found that the need for hot cuts "creates an insurmountable disadvantage to [CLECs] seeking to serve the mass market" by con-

necting their own switches to the loops they would lease from incumbents—even at the low volume of orders that had been placed in the past. *Id.* at 572a-573a. The Commission further determined that incumbents likely would be unable to provide the vastly greater volumes of hot cuts that would become necessary if unbundled switching were eliminated for the mass market and service for new *and existing* mass market customers had to be cut over through the hot cut process to non-ILEC switching facilities. *Id.* at 561a-565a.

The FCC also made national impairment findings for certain categories of dedicated transport. The Commission determined that dedicated transport facilities have natural monopoly characteristics and that there are substantial structural impediments to the deployment of alternative transport facilities. Pet. App. 440a-442a, 473a-477a. The Commission found that a CLEC could earn sufficient revenues to overcome those disadvantages in the case of very-high-capacity transport facilities (for which it found no impairment), but not in the case of lower-capacity facilities such as DS1, DS3, and dark fiber facilities (for which it found impairment and required unbundling on a route-specific basis). *Id.* at 453a-456a, 464a-467a, 470a-471a, 477a-478a.

The Commission recognized that conditions in some local markets might provide a basis for finding that CLECs are not impaired without access to mass-market switching and lower-capacity transport. Pet. App. 486a, 508a-512a, 587a-589a, 596a-597a. The record before the FCC, however, did not contain "sufficiently granular information" to allow the agency to identify individual local markets in which CLECs might not be impaired. *Id.* at 265a. Furthermore, the agency concluded that "states are better positioned than [the

FCC] to gather and assess the necessary information." *Ibid.* The FCC accordingly "delegated" to state commissions the task of analyzing local conditions and determining the ILECs' unbundling obligations for mass-market switching and dedicated transport in any market in which they found no impairment under FCC-prescribed standards. *Id.* at 467a-468a, 471a-473a, 479a-480a, 570a-571a. In particular, the FCC authorized each state commission to create exceptions to the national unbundling requirements in any market where the state commission (1) found that deployment-based triggers were satisfied (*id.* at 481a-503a, 552a-553a, 596a-611a) or (2) determined a lack of impairment by applying the Commission's general impairment standard to the conditions in that local market to identify areas where competitive facilities could potentially be deployed (*id.* at 496a-497a, 503a, 611a-612a).

The Commission addressed the possibility that a state commission might require the unbundling of an element that the FCC had determined not to include on its list of unbundled elements. The Commission invited parties, in that event, to petition the FCC for a declaratory ruling that the state unbundling requirement exceeds the limits on state authority set forth in Section 251(d)(3). The Commission expressed the view that any such state requirement would be "unlikely" to survive scrutiny under Section 251(d)(3)(C), which preempts state laws that are not "consistent with" or "substantially prevent" implementation of the requirements of Section 251. Pet. App. 272a.

The Commission also concluded that the Bell operating companies must continue to provide access to some facilities or services that are no longer generally subject to unbundling under Section 251(c)(3), in accordance with the access requirements that those com-

panies had to satisfy to provide long-distance telephone service under 47 U.S.C. 271. Pet. App. 755a-758a. The Commission determined, however, that the cost-based pricing standard prescribed by Section 252(d)(1)—and the Commission's TELRIC pricing rules—would not apply to facilities or services that Bell companies provide solely to comply with Section 271. Instead, the Commission determined that prices for those facilities or services would be governed by the "just and reasonable" pricing standard set forth in Sections 201 and 202 of the Communications Act of 1934, 47 U.S.C. 201, 202. Pet. App. 758a-764a.

4. On petitions for review, the D.C. Circuit upheld some parts of the *Triennial Order* and vacated others. Pet. App. 1a-65a. Among other things, the court of appeals vacated the rules requiring unbundling of mass-market switching and dedicated transport. *Id.* at 8a-32a. First, the court held that the Commission lacked authority to delegate impairment determinations to the States. *Id.* at 9a-16a, 25a-27a. Having invalidated the States' ability to determine unbundling obligations, the court then vacated the agency's nationwide impairment findings for mass-market switching and dedicated transport. The court reasoned that the Commission, in making the nationwide impairment findings that were subject to further state consideration, did not itself sufficiently account for distinctions among markets or consider more narrowly tailored alternatives to unbundling. *Id.* at 16a-21a, 27a-32a.

The court of appeals rejected the CLECs' challenges to the FCC's rules concerning unbundling of ILEC broadband facilities. The court held that the agency had reasonably decided not to require unbundling of incumbents' broadband facilities in light of record evidence showing that mandatory unbundling of such

facilities was discouraging both incumbents and their potential competitors from investing in new broadband facilities. Pet. App. 34a-35a. The court of appeals also affirmed the Commission's decision to phase out line sharing. The court upheld as reasonable the Commission's conclusion under Section 251(d)(2) that other considerations (including the availability of alternative broadband facilities, the skewed incentives created by the extremely low rates that had been set for the line sharing network element, and the presence of substantial intermodal competition in the provision of broadband Internet access) outweighed any impairment that might result if line sharing arrangements were no longer available. *Id.* at 45a-47a.

Finally, the court of appeals dismissed as unripe the state commissions' challenges to the FCC's discussion concerning preemption of state unbundling requirements. The court determined that the Commission had made only a "general prediction" that state unbundling orders might be preempted in certain circumstances. Because the Commission had not yet taken any final action to preempt specific state regulations, and because deferral of judicial review would not cause any hardship to the state commissions, the court of appeals ruled that the States' preemption claims were not ripe for review. Pet. App. 63a-64a.

5. On August 20, 2004, the FCC released an *Order and Notice of Proposed Rulemaking*, FCC No. 04-179, <http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-179A1.pdf>, in which the agency solicited public comment on what unbundling rules it should issue to implement the court of appeals' mandate, and adopted interim measures to limit disruption in telecommunications markets during the pendency of the rulemaking. In a statement accompanying that recent decision, FCC

Chairman Powell noted that he has scheduled a Commission vote on the remand proceeding for December 2004. *Id.* at 41.

ARGUMENT

CLECs and state commissions have petitioned this Court to review the D.C. Circuit's decision. Those parties seek review insofar as the court of appeals upheld the FCC's determinations not to require unbundling of broadband elements and to phase out line sharing; dismissed as unripe contentions that the FCC unlawfully preempted state authority; and vacated the FCC rules requiring ILECs to unbundle mass-market switching and certain dedicated transport facilities, subject to impairment determinations by the States. None of those issues warrants review by the Court in this case.

1. *Broadband Unbundling.* The court of appeals correctly affirmed the FCC's decision not to require unbundling of the broadband capabilities of ILECs' loops. The Commission reasonably applied Section 251(d)(2) when it considered, "at a minimum," whether lack of access to those broadband loop capabilities "would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." 47 U.S.C. 251(d)(2). In the *Triennial Order*, the Commission construed the statutory "at a minimum" clause in accordance with its plain terms to authorize the agency to consider factors other than competitive impairment when deciding whether to require unbundling of particular network elements. Pet. App. 247a-258a. The court of appeals correctly held that the Commission's reading of the statute was reasonable, and that the Commission may decline to order unbundling "even in the face of some impairment, where such un-

bundling would pose excessive impediments to infrastructure investment." *Id.* at 37a. The Commission further found that the dampening effect of unbundling requirements on investment in broadband facilities outweighed the limited evidence that competitors would be impaired without unbundled access to certain broadband loops. *Id.* at 341a-362a. Identifying substantial record evidence that supports the agency's conclusion, the court of appeals upheld the Commission's determination not to require unbundling of broadband loop capabilities. *Id.* at 37a-45a.

There is no basis for the CLECs' assertion (04-15 Pet. 15-19) that the court of appeals' decision on the broadband unbundling rules conflicts with this Court's decisions in *AT&T* and *Verizon*. The CLECs rely on the Court's conclusion in *AT&T* that the Act does not impose a "facilities-ownership requirement" on carriers that seek to lease unbundled network elements. 04-15 Pet. 16-17 (quoting *AT&T*, 525 U.S. at 392). But in *AT&T*, this Court determined only that the Act does not require competing carriers to deploy some facilities of their own before they may lease any unbundled ILEC facilities. That determination has no bearing on the entirely different question whether considerations of investment incentives may justify a decision by the FCC to eliminate broadband unbundling obligations.

Contrary to the assertions of the CLECs (04-15 Pet. 17-18), the court's affirmance of the FCC's application of Section 251(d)(2) to broadband elements also does not conflict with *Verizon*. In that case, this Court rejected the ILECs' contention that the FCC's use of the TELRIC methodology to set rates for unbundled elements created unreasonable disincentives to invest in new facilities. Citing record evidence of significant investment in local telephone facilities by new com-

petitors, the Court concluded that the challenged regulatory scheme "is not easily described as an unreasonable way to promote competitive investment." 535 U.S. at 517. The *Verizon* decision did not foreclose the possibility that the Commission might in the future decline to require unbundling of particular facilities, such as new broadband loop facilities, out of concern for the effect such unbundling might have on investment incentives. Indeed, the Court in *Verizon* expressly declined to endorse the specific policies before it. See *id.* at 517, 539.

The court of appeals noted that the Commission had found evidence in its Triennial Review proceeding that the "regulatory environment" of unbundling had deterred ILECs from deploying the electronic equipment needed to provide broadband service over hybrid fiber-copper loops. Pet. App. 39a-40a, 356a-357a. Substantial record evidence also supported the Commission's conclusion that elimination of broadband unbundling requirements would give both ILECs and CLECs greater incentives to build out all-fiber loops to their customers' premises. *Id.* at 40a-41a, 312a-313a, 341a-342a, 356a-357a. On the basis of that evidence specifically addressing broadband facilities, the Commission reasonably decided to lift certain broadband unbundling requirements even though the absence of such unbundling might create some impairment. The court of appeals' affirmance of that decision involves a fact-bound application of Section 251 and does not conflict with any decision of this Court or any court of appeals.

Contrary to the CLECs' suggestion (04-15 Pet. 21), moreover, the FCC acted consistently with the Act when it considered investment incentives as part of its broadband unbundling analysis. In *Verizon*, this Court affirmed the Commission's rules for pricing network

elements after similarly considering whether those rules would unduly discourage the development of facilities-based competition. *Verizon*, 535 U.S. at 501-523. Moreover, Congress commanded the FCC to promote broadband investment. Section 706 of the 1996 Act directs the Commission to "encourage the deployment * * * of advanced telecommunications capability to all Americans" by utilizing "regulating [sic] methods that remove barriers to infrastructure investment." 110 Stat. 153 (47 U.S.C. 157 note). The Commission determined in the *Triennial Order* that it could best foster broadband investment and facilities-based competition by relieving ILECs of certain unbundling obligations with respect to broadband facilities. That determination does not merit further review.

2. *Line Sharing and Preemption*

a. The court of appeals correctly upheld the FCC's decision to phase out line sharing requirements, under which ILECs had been required to provide access to the high-frequency portion of their copper loops to CLECs for the provision of broadband services. Pet. App. 45a-47a.

In attacking that aspect of the *Triennial Order*, the state commissions focus principally on the FCC's finding that broadband service provided over cable television systems ("cable modem service") is a competitive alternative to broadband services that are provided over ILEC networks. 04-18 Pet. 14-17; 04-12 Pet. 28; see Pet. App. 331a-332a. The state commissions contend that cable modem service is not widely available in every State. Even assuming that to be true, however, it is irrelevant here. The Commission made clear—and the court of appeals understood—that the competitive alternative provided by cable modem

service was not the "dispositive" factor in the agency's decision to end line sharing. *Id.* at 46a, 332a. Rather, the Commission determined that continuing the ILECs' line sharing obligations was unnecessary under Section 251(d)(2) because CLECs could economically provide broadband service by leasing the entire loop (not just the high-frequency portion) from an ILEC. Applying its impairment standard, which takes into account all potential revenues from a loop's various uses (including voice, data, video, and other services), the Commission concluded that the revenues from those services *collectively* "would offset the costs associated with purchasing the entire loop." *Id.* at 45a; see *id.* at 327a-328a. The state commissions do not seriously contest that fact-bound conclusion.

The Commission also found substantial evidence on the record before it that, even if ILECs did not have to share their loops with CLECs in line sharing arrangements, in light of the rules adopted in the *Triennial Order*, CLECs could lease entire unbundled loops and enter into "line-splitting" arrangements with other CLECs—under which one CLEC provides broadband service using the high-frequency capabilities of the loop, while another CLEC (rather than the ILEC, as in line sharing) uses the low-frequency portion of the loop to provide voice service. Pet. App. 45a, 328a-329a. In light of all those factors, the Commission reasonably decided to discontinue mandatory line sharing. The agency's conclusion about the significance of the record evidence raises no issue that would warrant review by this Court.

b. To address the legitimate business concerns of CLECs that have used line sharing arrangements to provide broadband service to their customers, and to protect those customers from service disruption or

drastic rate changes, the Commission adopted a three-year plan for phasing out the ILECs' line sharing obligations and phasing in associated price increases in annual increments. California contends that the Commission's formula for setting rates for transitional line sharing during this three-year period impermissibly preempts state ratemaking authority. 04-18 Pet. 20-23. Because it appears that no party raised that issue before the FCC, the issue cannot be raised on judicial review of the *Triennial Order*. See 47 U.S.C. 405; *Bartholdi Cable Co.* v. *FCC*, 114 F.3d 274, 279-280 (D.C. Cir. 1997). This preemption issue, moreover, received so little attention in the briefs below that the court of appeals did not even address it. See *Glover* v. *United States*, 531 U.S. 198, 205 (2001) ("In the ordinary course we do not decide questions neither raised nor resolved below."). In any event, the issue concerns a three-year transition period, of which one year already has run. It therefore lacks ongoing importance.

Finally, California's ratesetting-preemption claim lacks merit. The FCC has authority to adopt pricing methodologies for unbundled network elements, which the States then apply. *AT&T*, 525 U.S. at 377-385. Like the pricing rules at issue in *AT&T* and *Verizon*, the Commission's transitional pricing rules for line sharing do not set specific rates. Rather, they require that line sharing rates reflect certain percentages of the full loop rate that is set by the relevant State. Consistent with the statutory division of responsibilities between the FCC and the States, the FCC has established a methodology and the States will "implement that methodology, determining the concrete result in particular circumstances." *Id.* at 384. Furthermore, the States' past efforts to establish line sharing rates justified the FCC's decision to place limits on the

States' discretion to set transitional rates. As the court of appeals observed, most States had previously set line sharing rates "at approximately zero," which "distorted competitive incentives." Pet. App. 45a-46a. The Commission's transitional rate formula was reasonably designed to address that problem.

c. California contends that the FCC unlawfully preempted state authority to require line sharing when it is not required under FCC rules. 04-18 Pet. 23-28. The court of appeals correctly ruled that that contention is not ripe in the instant proceeding. Pet. App. 63a-64a. Contrary to California's suggestion, the *Triennial Order* does not include final FCC action preempting any state line sharing rule or other unbundling requirement. In paragraph 195 of the *Triennial Order*, the Commission invited parties to seek declaratory rulings from the FCC if they believe that a particular state unbundling obligation is inconsistent with the limits on state authority in 47 U.S.C. 251(d)(3) and the FCC's rules. Pet. App. 272a. The Commission predicted that if States require line sharing or unbundling of elements that the FCC has determined not to subject to mandatory unbundling under Section 251, such state requirements are "unlikely" to be found consistent with the 1996 Act. *Id.* at 63a, 272a. But the Commission did not preempt any state rules, and it is uncertain whether the FCC ever will issue a preemption order of this sort in response to a request for declaratory ruling. See *Alascom, Inc.* v. *FCC*, 727 F.2d 1212, 1218-1220 (D.C. Cir. 1984). There also is no urgency to review that issue before a concrete controversy involving a particular state ruling is presented. Under the circumstances, California's preemption claim is not ripe for review. See *National Park Hospitality Ass'n* v. *Department of the Interior*, 538 U.S. 803, 807-812 (2003);

Ohio Forestry Ass'n v. *Sierra Club*, 523 U.S. 726, 732-737 (1998).

Even if California's preemption claim were ripe, California is wrong in arguing (04-18 Pet. 24-26) that the FCC's unbundling rules lack preemptive effect. This Court has long recognized that "[f]ederal regulations have no less pre-emptive effect than federal statutes." *Fidelity Fed. Sav. & Loan Ass'n* v. *De la Cuesta*, 458 U.S. 141, 153 (1982). Accordingly, "[t]he statutorily authorized regulations of an agency will preempt any state or local law that conflicts with such regulations or frustrates the purposes thereof." *City of New York* v. *FCC*, 486 U.S. 57, 64 (1988).

California incorrectly contends that Section 251(d)(3), which preserves some state authority, effectively nullifies the preemptive power of the FCC's unbundling regulations. Unless Congress expressly provides otherwise, a statutory "saving clause" such as Section 251(d)(3) does not diminish the preemptive force of federal regulations. See *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 869-874 (2000). Section 251(d)(3) is essentially a "conflict-preemption" provision and is, therefore, limited in scope. It does not preserve all state network-access requirements, but only preserves those state regulations that are "consistent with the requirements" of Section 251 and do "not substantially prevent implementation" of those requirements. 47 U.S.C. 251(d)(3)(B) and (C). Because Congress authorized the Commission to set standards governing the determination of "what network elements should be made available," 47 U.S.C. 251(d)(2), state laws or rulings inconsistent with the FCC's unbundling regulations would be inconsistent with the congressionally authorized "implementation of the requirements of

[Section 251]," 47 U.S.C. 251(d)(3)(C), and hence preempted.

d. The National Association of Regulatory Utility Commissions and the Arizona Corporation Commission (collectively NARUC) make a similar preemption claim concerning the pricing of facilities or services for which the FCC has determined not to continue unbundling obligations under 47 U.S.C. 251(c)(3). 04-12 Pet. 29-30. The Bell companies must continue to provide some facilities or services under the separate requirements of 47 U.S.C. 271, the statute that governs the Bell companies' entry into the long-distance market. In the *Triennial Order*, the FCC ruled that the cost-based pricing standard prescribed by 47 U.S.C. 252(d)(1) does not apply to those facilities or services that must be made available only under Section 271, rather than under Section 251. The Commission stated that, in that situation, rates must comply with the "just and reasonable" pricing standard in Sections 201 and 202 of the Communications Act of 1934, 47 U.S.C. 201, 202. Pet. App. 758a-764a. The Commission also stated that determining a Bell company's compliance with that pricing standard for a particular facility or service requires "a fact-specific inquiry" that the agency will undertake, if necessary, "in an enforcement proceeding brought pursuant to section 271(d)(6)." *Id.* at 764a.

NARUC claims that the FCC's "pricing proposal" under Section 271 intrudes on the States' authority to set rates for network elements. 04-12 Pet. 29-30. That issue was not prominently raised in the briefs below, and the court of appeals did not address it. The issue is unripe for consideration by this Court for another reason as well. As petitioners acknowledge, 04-12 Pet. 29, the FCC has made only a pricing "proposal." The Commission has yet to apply its announced "just and

reasonable" approach to rates in any State. Unless and until the Commission conducts an enforcement proceeding under Section 271(d)(6) to review rates in a particular State, there is no final agency action for a court to review, nor any concrete injury to NARUC.

In addition, NARUC is wrong to suggest that the FCC's pricing proposal forecloses the States from setting rates for facilities or services that are provided solely to comply with Section 271. In the *Triennial Order*, the FCC expressed no opinion as to precisely what role the States would play in establishing rates under Section 271. Until the Commission expressly addresses that question, the matter is not suitable for judicial review.

In any event, NARUC's challenge to the FCC's pricing discussion rests on a flawed legal premise. NARUC suggests that Section 252 of the Act gives state commissions exclusive authority to set rates for network elements and equivalent facilities and services under all circumstances. 04-12 Pet. 29-30. That is incorrect. Section 252(c)(2) directs state commissions to "establish any rates for * * * network elements *according to subsection (d)*." 47 U.S.C. 252(c)(2) (emphasis added). Section 252(d) specifies that States set "the just and reasonable rate for network elements" *only* "for purposes of [47 U.S.C. 251(c)(3)]." 47 U.S.C. 252(d)(1). The statute makes no mention of a state role in setting rates for facilities or services that are provided by Bell companies to comply with Section 271 and are *not* governed by Section 251(c)(3). The FCC reasonably concluded that it is authorized to review the rates for those facilities or services, because the statute elsewhere expressly empowers the FCC to enforce compliance with

the requirements of Section 271. See 47 U.S.C. 271(d)(6).[2]

3. *Narrowband Unbundling.* Finally, all of the petitioners seek review of the D.C. Circuit's vacatur of the agency rules requiring the unbundling of mass-market switching and dedicated transport. 04-15 Pet. 22-30; 04-12 Pet. 15-28; 04-18 Pet. 29. The court of appeals vacated those rules on the grounds that: (1) the FCC lacked authority for its delegation to the States of responsibility for deciding whether the FCC's unbundling standards would allow an ILEC to obtain relief for particular facilities in particular geographic areas; and (2) without that state-based exception process, the FCC's nationwide findings of impairment with respect to mass-market switching and dedicated transport were overly broad. Pet. App. 8a-27a.

The D.C. Circuit's analysis of the FCC's nationwide impairment findings is inconsistent in some respects with the applicable principles of deferential judicial review. As this Court has recognized, the 1996 Act is a complex statute replete with ambiguity, and Congress "is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency." *AT&T*, 525 U.S. at 397; see *Verizon*, 535 U.S. at 539 ("The job of judges is to ask whether the Commission made choices reasonably within the pale of statutory possibility in deciding what and how items must be leased and the way to set rates for leasing

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[2] This case does not involve the question whether state commissions may arbitrate issues outside the scope of Section 251(c) when parties voluntarily include those issues within negotiations toward an interconnection agreement. See generally *Coserv Limited Liability Corp.* v. *Southwestern Bell Tel. Co.*, 350 F.3d 482 (5th Cir. 2003).

them."). Nevertheless, the Commission intends to proceed expeditiously to adopt new rules in light of the requirements specified by the D.C. Circuit in *USTA I* and this case. In its Notice of Proposed Rulemaking concerning those new rules, the Commission recognized "the necessity of formulating permanent rules quickly" and stated its intent to issue such rules within approximately six months. See FCC No. 04-179, ¶¶ 15, 21 <http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-179A1.pdf>. The Chairman of the FCC has scheduled the matter for a vote by the full Commission in December 2004. See pp. 13-14, *supra*.

Quick agency action to establish new rules consistent with the court of appeals' decision will avoid the uncertainty—for consumers and the communications industry as a whole—that would be associated with the process of merits review by this Court and any ensuing remand proceedings in the court of appeals. For that reason, and to conserve both judicial and agency resources, the government has concluded that the court of appeals' decision does not, on balance, warrant review at this time.

a. The ILECs contended below—and the court of appeals agreed—that the FCC lacked authority under the Communications Act to delegate to the state commissions a central role in making final unbundling determinations for mass-market switching and some types of dedicated transport. Although the court of appeals discussed delegation issues generally, see Pet. App. 10a-16a, its conclusion was that the provisions of the Communications Act do not indicate with sufficient clarity a congressional authorization for the specific state role established by the *Triennial Order*. *Id.* at 9a-10a. That conclusion is not in conflict with any other judicial decision specifically addressing the Act. Fur-

thermore, the D.C. Circuit has not applied the delegation analysis described in the instant decision in any other context, and the practical consequences of its approach are unclear. For those reasons, it would be premature for this Court to consider the broader delegation questions asserted by the petitions for certiorari, including the arguments that the court of appeals' reasoning conflicts in some respects with *Batterton* v. *Francis*, 432 U.S. 416 (1977), and *Wisconsin Department of Health & Family Services* v. *Blumer*, 534 U.S. 473 (2002).

b. In this case and *USTA I*, the D.C. Circuit imposed on the Commission, in conducting its impairment analysis under Section 251(c)(3) and (d)(2), requirements that go beyond those found in the statute itself. As the court of appeals has recognized, the 1996 Act provides the FCC with "no detail" about how to carry out the "extraordinar[ily] complex[]" task of determining which network elements incumbent carriers must make available to competitors. *USTA I*, 290 F.3d at 421-422. Furthermore, as the government explained in its response to the petition for certiorari in *USTA I*,[3] the D.C. Circuit's constraints on the FCC's impairment analysis are in tension with this Court's reasoning in *AT&T* and *Verizon*. In those cases, this Court reaffirmed and applied the settled principle that reviewing courts must generally defer to an expert agency's reasonable implementation of a complex, broadly drafted statute. See, *e.g.*, *AT&T*, 525 U.S. at 397; *Verizon*, 535 U.S. at 539; see generally *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-845 (1984).

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[3] Fed. Resp. Br. at 14-16, *WorldCom, Inc.* v. *United States Telecom Ass'n*, *supra* (No. 02-858).

Nevertheless, the court of appeals did not purport to apply the statutory impairment standard conclusively to particular facts. The court instead stated that it was making "general observations" about its understanding of the impairment standard and required the Commission to conduct "a re-examination" of impairment issues on remand and "implement a lawful scheme." Pet. App. 21a, 22a, 27a. As noted, the FCC intends quickly to issue new network-unbundling rules that comply with the court of appeals' decision. In light of that intention, and for the other reasons stated above, the United States and the FCC have concluded that this aspect of the court of appeals' decision does not warrant further review.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2004

Nos. 04-12, 04-15 & 04-18

Supreme Court, U.S.
FILED
SEP 1 - 2004
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, ET AL.,
Petitioners,

AT&T CORP., ET AL.,
Petitioners,

AND

PEOPLE OF THE STATE OF CALIFORNIA, ET AL.,
Petitioners,

v.

UNITED STATES TELECOM ASSOCIATION, ET AL.,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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QUESTIONS PRESENTED

1. Whether the D.C. Circuit correctly determined that the FCC may not subdelegate to 51 separate state regulatory commissions the responsibility that Congress expressly assigned to the FCC to determine which "network elements" incumbent local exchange carriers must make available to their competitors on an "unbundled" basis.

2. Whether the D.C. Circuit, in reversing the FCC's decision to require blanket nationwide unbundling of certain facilities, reasonably applied established principles of administrative law when it concluded, for example, that the FCC ignored significant alternatives raised in the record.

3. Whether the FCC acted reasonably in finding that it is consistent with 47 U.S.C. § 251(d)(2)(B) to require only limited unbundling of broadband facilities when, among other things, there is already extensive competition in the market for broadband services and competitors can provide broadband services by relying on other unbundled network elements.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, respondents BellSouth Corporation, Qwest Communications International Inc., SBC Communications Inc., the United States Telecom Association, and the Verizon telephone companies state the following:

BellSouth Corporation has no parent company, and no publicly held company owns 10% or more of its stock.

Qwest Communications International Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

SBC Communications Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

The United States Telecom Association ("USTA") is the nation's oldest and leading not-for-profit trade association for the local telephone industry. Founded more than a century ago, USTA's carrier members provide a full array of voice, data, and video services over wireline and wireless networks. USTA also has international and associate members that include consultants, communications equipment providers, banks and investors, and other parties with interests in the local exchange carrier industry. USTA has no parent companies, subsidiaries, or affiliates for which disclosure is required.

The Verizon telephone companies are wholly owned subsidiaries of Verizon Communications Inc., a publicly held company. Those subsidiaries are:

Contel of the South, Inc. d/b/a Verizon Mid-States
GTE Midwest Incorporated d/b/a Verizon Midwest
GTE Southwest Incorporated d/b/a Verizon Southwest
The Micronesian Telecommunications Corporation
Verizon California Inc.
Verizon Delaware Inc.
Verizon Florida Inc.
Verizon Hawaii Inc.
Verizon Maryland Inc.

Verizon New England Inc.
Verizon New Jersey Inc.
Verizon New York Inc.
Verizon North Inc.
Verizon Northwest Inc.
Verizon Pennsylvania Inc.
Verizon South Inc.
Verizon Virginia Inc.
Verizon Washington, DC Inc.
Verizon West Coast Inc.
Verizon West Virginia Inc.

Verizon Communications Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

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PRELIMINARY STATEMENT

Petitioners raise two sets of issues. Neither merits plenary review by this Court.

First, petitioners claim that the D.C. Circuit wrongly invalidated the FCC's third attempt to impose the same "blanket" unbundling requirements for narrowband facilities that this Court vacated in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999) ("*IUB*"). The FCC and the United States, however, have decided *not* to seek review of that ruling. As petitioner AT&T has itself argued in similar circumstances, "[i]f the expert agency charged with administering [a particular regulatory issue] has determined that the court of appeals' decision does not undermine its programmatic objectives to such an extent as to warrant further review, then there is no cause for this Court to conclude otherwise."[1] That is precisely right, and it accords with this Court's consistent practice. Indeed, we are not aware of a single case — and petitioners do not cite one — in which this Court has granted review of a decision invalidating a federal agency rule where the government itself did not seek review.

Moreover, the FCC has stated that it intends to adopt new narrowband unbundling rules by December 15 of this year. The rules at issue here may thus be supplanted before this Court could even hear this case, much less decide it on the merits. There is no reason for the Court to address issues that are slated to become moot before a decision can be reached.

Even aside from these threshold considerations, the judgment below does not merit review. Petitioners argue that, when Congress assigns a specific task to a federal agency, that agency remains free to subdelegate its responsibility to a state agency that is not accountable to Congress. Simply put, in petitioners' view, every time Congress directs a federal agency to do something, it must add a "thou shalt not delegate" codicil to the statute or risk having the agency assign that task to representatives of a separate sovereign. The D.C.

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[1] Br. in Opp. for Time Warner Entertainment Co./AT&T Corp. at 12, *Consumer Fed'n of Am. v. FCC*, No. 01-223 (U.S. filed Nov. 2, 2001).

Circuit properly rejected that facially untenable position, and not a single decision supports it.

AT&T and NARUC also challenge the D.C. Circuit's identification of specific flaws in the FCC's impairment analysis for these narrowband facilities. The questions they present, however, involve the routine application of settled principles of administrative law, such as an agency's obligation to consider alternatives raised by parties to a rulemaking proceeding and to provide an adequate and reasoned explanation for its choices.

Moreover, contrary to AT&T's assertion, the D.C. Circuit's analysis is entirely consistent with — indeed, largely dictated by — this Court's decisions. The D.C. Circuit's insistence that impairment decisions be made in the context of geographic markets follows directly from this Court's holding in *IUB* that Congress required the FCC to consider the availability of alternative facilities outside the incumbent local exchange carrier's network. *See* 525 U.S. at 389-90. One cannot rationally consider the availability of such alternatives without looking at a geographic market; otherwise, incumbents could be required to offer facilities in New York solely because there are no alternative facilities in rural Iowa. Likewise, *Verizon Communications, Inc. v. FCC*, 535 U.S. 467 (2002), makes plain that unbundling should be limited to true "bottleneck" facilities to encourage facilities-based competition in other facilities that competitors could provide themselves: as this Court stated, "entrants may need to share some facilities that are very expensive to duplicate . . . in order to be able to compete in other, more sensibly duplicable elements." *Id.* at 510 n.27. That understanding is wholly consonant with the D.C. Circuit's judgment here.

Second, petitioners raise a series of run-of-the-mine agency review issues on which the D.C. Circuit affirmed the determinations of the FCC. These issues arise primarily from the FCC's reasonable and fact-bound conclusions (1) that competitive local exchange carriers are for the most part not "impaired," within the meaning of 47 U.S.C. § 251(d)(2)(B),

without access to certain facilities used to provide high-speed "broadband" services (that is, services such as high-speed Internet access), (2) that any conceivable impairment can be addressed with limited unbundling and access to alternative equipment, and (3) that unbundling is contrary to the intent of Congress where, as here, the market is fully competitive and incumbent local exchange carriers are in fact secondary players. There is no compelling reason for this Court to review the D.C. Circuit's affirmance of such discrete, record-based agency judgments.

STATEMENT OF THE CASE

1. The Telecommunications Act of 1996 ("1996 Act") seeks to transform local telecommunications from a market characterized by exclusive franchises to one in which multiple providers compete to provide more efficient and innovative service over their own facilities. *See, e.g.*, S. Conf. Rep. No. 104-230, at 148 (1996) (finding that "meaningful facilities-based competition" is possible). Because Congress understood, however, that new entrants into local markets (known as competitive local exchange carriers or "CLECs") might not be able to duplicate immediately *every* aspect of a local telephone network, the statute allows them to obtain "*[s]ome* facilities and capabilities" from the incumbent local exchange carrier ("ILEC"). *Id.* (emphasis added). The piece-parts of the ILEC's network that must be shared are known as unbundled network elements or "UNEs." *See* 47 U.S.C. § 251(c)(3). As this Court has explained, access to some difficult-to-duplicate network elements may enhance facilities-based competition by allowing new entrants to compete using other, more-easily duplicated facilities of their own. *See Verizon*, 535 U.S. at 510 n.27 ("competition as to 'unshared' elements may, in many cases, only be possible if incumbents simultaneously share with entrants some costly-to-duplicate elements").

The 1996 Act assigns to the FCC the job of identifying the "bottleneck" facilities, *id.* at 507, that are unsuitable for competitive supply and thus should be made available as

UNEs. Congress directed "*the Commission* . . . to establish regulations to implement the requirements of [§ 251]," including the provisions governing the UNEs that incumbents must make available to CLECs. 47 U.S.C. § 251(d)(1) (emphasis added). Furthermore, Congress specified that, "*[i]n determining what network elements should be made available* for purposes of" § 251(c)(3), "*the Commission* shall consider, at a minimum, whether . . . the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." *Id.* § 251(d)(2)(B) (emphases added). Accordingly, the FCC has acknowledged that Congress "direct[ed]" the "Commission" to undertake the "analysis required to determine what network elements should be made available," App. 259a (¶ 179),[2] and thus that "states do not have plenary authority under federal law to create, modify or eliminate unbundling obligations," App. 264a (¶ 187).

2. In its 1996 *Local Competition Order*,[3] the FCC exercised its § 251(d)(2) authority to determine what network elements should be made available, but it failed to confine its unbundling requirements to bottleneck facilities that could not reasonably be duplicated. Instead, it required access to *all* narrowband voice facilities *everywhere*.

This Court vacated these "blanket" unbundling rules in *IUB*. As the Court explained, the FCC erred in presuming that ILECs had a baseline duty to provide unbundled access to *all* network elements for which such access was technically feasible and that the "impairment" standard "merely permitt[ed] it to soften that obligation by regulatory grace." *IUB*, 525 U.S. at 391. The Court held that a finding of "impairment" is a prerequisite to unbundling and, moreover, that the statute "requires the Commission to determine on a rational basis *which* network elements must be made avail-

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[2] "App." refers to the appendix to AT&T's certiorari petition.

[3] 11 FCC Rcd 15499 (1996) (subsequent history omitted).

able." *Id.* at 391-92. In applying that standard, the Court stated, the FCC (1) must consider whether competitors could engage in facilities-based competition by deploying or obtaining facilities from sources other than the incumbent, and (2) cannot treat any increase in cost considered in isolation as an "impairment." *See id.* at 389-90. In short, the statute places "clear limits" on the FCC's unbundling authority and requires it to adopt a "limiting standard" for unbundling that is "rationally related to the goals of the Act." *Id.* at 388, 397.

3. On remand from *IUB*, the FCC failed to heed this Court's directions. The FCC's then-Chairman dismissed this Court's decision as a mere "bump in the road,"[4] and the FCC proceeded to adopt blanket national unbundling rules that were substantively identical to the ones this Court had vacated. In a separate *Line Sharing Order*,[5] moreover, the FCC for the first time added to the UNE list facilities used exclusively in the highly competitive market for "broadband" services such as high-speed Internet access. *See USTA v. FCC*, 290 F.3d 415, 419-21 (D.C. Cir. 2002) ("*USTA I*") (describing the 1999 unbundling rules in detail), *cert. denied*, 538 U.S. 940 (2003).

On review of those decisions, a unanimous D.C. Circuit panel, applying the principles established by this Court's decision in *IUB*, vacated the FCC's second set of unbundling rules. The court of appeals held that the FCC's purportedly revised unbundling standard remained deficient in key respects. Among other things, the Commission had refused to make any geographic or product-market distinctions in determining whether, as this Court had required, alternative facilities are, or could reasonably be made, available. *See id.* at 422.

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[4] William E. Kennard, Chairman, FCC, *Moving On*, Remarks Before the NARUC Winter Meeting, Washington, D.C. (Feb. 23, 1999).

[5] 14 FCC Rcd 20912 (1999) (subsequent history omitted).

The D.C. Circuit also invalidated the *Line Sharing Order* because the FCC focused exclusively on a single broadband technology — DSL — and failed to address the agency's own findings that the broadband market as a whole (which includes market-leading cable-modem providers) was already characterized by "robust competition" and was in fact "domina[ted]" by cable. *Id.* at 428.

Several private parties, but (as in this case) not the FCC or the United States, filed a petition for certiorari seeking review of the D.C. Circuit's *USTA I* decision. This Court denied that petition. *See WorldCom, Inc. v. USTA*, 538 U.S. 940 (2003) (No. 02-858).

4. Despite these two judicial vacaturs, and over a scathing dissent from FCC Chairman Powell, a 3-2 majority of the FCC declined yet again on remand to impose any meaningful limit on blanket nationwide unbundling of basic narrowband voice facilities.

The FCC majority reached that result in the teeth of an extensive record demonstrating that CLECs could provide, and in fact were providing, their own facilities in many markets around the country. Among other things, the record showed that more than 200 competitors had deployed in excess of 1,300 circuit switches that were being used — in wire centers covering 86% of Bell company lines — to serve more than 16 million lines, including 3 million residential lines. *See* C.A. App. 979; App. 980a (Powell Stmt.).[6] Similarly, in 49 of the top 50 markets in the country, there were five or more competitors self-providing high-capacity transmission facilities between switches, and competitors had deployed at least

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[6] In addition, the record showed, there were approximately 9,500 CLEC "packet switches" that are increasingly being used to provide voice as well as data services, and incumbents were also facing extensive and rapidly increasing competition for both lines and minutes from wireless services. *See* Declaration of Robert D. Willig ¶ 88, attached to Comments of AT&T Corp., CC Docket Nos. 01-338 *et al.* (FCC filed Apr. 5, 2002) ("CLECs had deployed 9,524 data switches by 2001").

184,000 miles of such facilities. *See* C.A. App. 1021-22, 1182-201.

Despite the overwhelming evidence presented to the FCC, the state commissions, which the statute charges with *implementing* the FCC's unbundling rules, urged the FCC to delegate to them unrestricted authority to make the ultimate unbundling decisions.[7] The FCC majority did precisely that, leaving the state commissions free to perpetuate maximum unbundling. For both mass-market switching and high-capacity facilities (including both the transmission facilities that connect switches and the loops that connect switches to larger customers), the FCC adopted provisional findings of impairment designed to keep maximum unbundling in place temporarily. It then expressly "delegated" to 51 separate state commissions its duty under § 251(d)(2) to make the ultimate determination of which network elements must be made available. *See* App. 265a-268a (¶¶ 188-190). These state decisions were to be effective without any review or approval by the FCC. *See, e.g.*, App. 513a (¶ 426).

More particularly, for "mass-market" switching,[8] the FCC made a provisional finding of impairment pending the state determinations, based solely on supposed difficulties with the "hot-cut" process by which a loop (the wire or equivalent facility running from a switch to an end-user's premises) is transferred from an incumbent's switch to a competitor's switch. App. 507a (¶ 422). The FCC barely acknowledged

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[7] Ex Parte Letter from David A. Svanda, President, NARUC, *et al.*, to Michael Powell, Chairman, FCC, *et al.* (Nov. 20, 2002) (attaching letter from representatives of 34 state commissions seeking to retain the authority to impose unbundling without "[a]ny restriction" on their ability to do so) (C.A. App. 1707).

[8] The "mass market" generally includes residential and small-business customers. The FCC did not require switch unbundling for generally larger-business "enterprise" customers, but the record here demonstrated that that covered a miniscule fraction of all switched lines. *See* C.A. App. 624.

that it had previously approved hot-cut processes in virtually every state (and the District of Columbia), nor did it consider whether other mechanisms that had been suggested by commenters could address supposed hot-cut problems without the need for unbundling on a nationwide basis.

The FCC then gave state commissions nine months to determine whether to mandate switch unbundling on a permanent basis. During that time, state commissions were to apply a two-stage analysis. First, the state commissions were to find "no impairment" when either "three or more unaffiliated competing carriers each is serving mass market customers in a particular market with the use of their own switches" or "two competitive wholesale providers" of switching are serving the market. App. 606a, 610a (¶¶ 501, 505). Any semblance of objectivity to this test was undermined by the fact that the FCC left it completely to the states to "define the markets in which they will evaluate impairment." App. 599a (¶ 495). If this first test was not satisfied, the states were next to determine the potential ability of CLECs to deploy their own switches based on what FCC Chairman Powell, in dissent, called a "shot-gun blast of every imaginable economic criterion." App. 973a (Powell Stmt.); *see* App. 611a-630a (¶¶ 506-520). In sum, the FCC's Order "let[] the states make crucial decisions regarding market definition and application of the FCC's general impairment standard . . . , with FCC oversight neither timely nor assured." App. 13a-14a.

The FCC employed a similar strategy for transport facilities and high-capacity loops. Although the Commission did not dispute that competitors had deployed these facilities in many markets, it nevertheless made provisional findings of *nationwide* impairment on the ground that it could not determine the *specific routes* on which CLECs had deployed such facilities. *E.g.*, App. 385a-386a (¶ 314).

The FCC then again delegated to the states the authority to make the ultimate unbundling determinations according to another two-stage inquiry. At the first stage, states were to

grant relief from unbundling only if multiple alternative providers had already deployed facilities on a specific point-to-point route. *E.g.*, App. 400a (¶ 329). At the second stage, states were to use their "analytical flexibility" to consider a long series of factors and determine whether CLECs could deploy facilities at locations where they have not already done so. *E.g.*, App. 405a (¶ 335). In the FCC's own words, its Order "provide[d] no guidance on how these various factors are to be assessed and weighed." App. 509a (¶ 425 n.1300).

In contrast to its decision to maintain maximum unbundling for traditional narrowband voice facilities, the FCC decided to impose limited unbundling obligations on most facilities used to provide high-speed broadband services. For example, subject to a transition period, the Commission freed incumbents from the obligation to offer "line sharing" — that is, access only to the high-frequency portion of the loop used to provide high-speed DSL service — as an unbundled network element. Contrary to the suggestions in the petitions, *e.g.*, Cal. Pet. 13, the Commission determined that CLECs are not impaired within the meaning of § 251(d)(2) without line sharing. *See* App. 327a-330a (¶¶ 258-260). Even beyond that finding, the Commission concluded that, given the extensive intermodal competition (primarily from cable-modem providers, but also from wireless, satellite, and power lines), competition in the broadband market was not dependent on unbundling, and, moreover, mandating unbundling would in fact decrease facilities-based competition, in conflict with a core goal of the 1996 Act. *See* App. 331a-332a (¶¶ 261-263).

The Commission likewise found that CLECs are not impaired without access to the next-generation fiber to the home (or "FTTH") facilities that can support a broad range of broadband technologies including video-on-demand and high-speed data transmission. *See* App. 342a (¶ 273). The FCC concluded that these facilities were just beginning to be deployed and that ILECs had no inherent advantage over

CLECs in being able to bring these new technologies to consumers. *See* App. 343a-345a, 349a (¶¶ 274-275, 279) ("competive LECs have demonstrated that they can deploy FTTH loops and are doing so"). The Commission further explained that, because § 251(d)(2) specifies that impairment is a "minimum" prerequisite for unbundling and because § 706 of the 1996 Act requires the Commission to "encourage the deployment . . . of advanced telecommunications capability to all Americans," its judgment was necessarily "informed" by its finding that requiring unbundling would create disincentives for investment in this new technology. *See* App. 341a-342a, 348a (¶¶ 272, 278). The FCC did require, however, that, where an ILEC deploys fiber to the home to existing customer locations, it must make available a narrowband voice channel to CLECs over either an existing copper facility or the new fiber. *See* App. 346a (¶ 277).

Finally, with respect to hybrid loops (that is, those containing both fiber and copper), the Commission found some limited impairment, but balanced against that finding (1) its conclusion that alternative unbundling requirements offer suitable alternatives that "adequately address[]" whatever limited impairment may exist, (2) the effect of unbundling on facilities investment, and (3) the existence of intermodal alternatives for consumers and the fact that "broadband services . . . are currently provided in a competitive environment" in which cable companies have "a leading position." App. 353a-354a, 357a-360a (¶¶ 286, 291-292). Given these factors, the Commission determined that limited unbundling was appropriate: ILECs would be required to provide a narrowband transmission path to CLECs, but not to turn broadband capabilities over to their competitors. App. 362a-363a (¶¶ 295-296).

5. On review, the D.C. Circuit (Williams, J., joined by Edwards and Randolph, JJ.) again unanimously vacated the FCC's rule re-imposing blanket unbundling of narrowband facilities, but affirmed the FCC's rule imposing limited unbundling of broadband facilities.

The D.C. Circuit vacated the FCC's narrowband unbundling determinations for several independent reasons. First, the court held that it was inconsistent with Congress's explicit assignment of unbundling authority to the FCC for the federal agency to subdelegate its responsibility for final unbundling decisions to state agencies that are not accountable to federal authorities. *See* App. 9a-16a. The court noted that the FCC itself "acknowledge[d]" that, in § 251(d)(2), Congress "instruct[ed]" the *federal agency*, not the state commissions, to "'determin[e]' which network elements shall be made available to CLECs on an unbundled basis." App. 9a (quoting 47 U.S.C. § 251(d)(2)). In light of that express congressional assignment, the FCC had a statutory duty to make the ultimate unbundling determinations, and there was no presumption that the FCC could subdelegate that duty to the states. *See* App. 10a.

Independent of this delegation issue, the D.C. Circuit concluded that the FCC's Order suffered from multiple failures of reasoned decisionmaking. *See* App. 16a-32a. The court concluded, for example, that the FCC's prior approvals of ILEC hot-cut processes created substantial "doubt that the record supports a national impairment finding for mass market switches" on this basis. App. 18a. In addition, the FCC had not "articulated any reasonable explanation" for rejecting more tailored alternatives to switch unbundling that commenters had raised and that would appear to have resolved any supposed hot-cut difficulties. App. 20a-21a. Similarly, the court concluded that the FCC had violated basic precepts of administrative rationality in "simply ignor[ing] facilities deployment along similar routes" in requiring transport and high-capacity loops to be unbundled. App. 28a (agency had failed to "explain" this conclusion). The FCC's Order also "ma[de] no attempt" to explain how it was consistent with the "purposes of the Act" to base an impairment determination on a finding that state-regulated retail rates were too low to permit profitable entry. App. 24a. Finally, the FCC's impairment inquiry had failed to "consider" the fact that, in cer-

tain instances, CLECs were competing successfully using incumbent facilities obtained under tariffs. App. 31a-32a.

As to the FCC's decision to limit unbundling of broadband facilities, the D.C. Circuit found that the FCC had acted rationally based on the record evidence before it as to each of these issues and had relied on a permissible understanding of the statute. The court held that the FCC had "reasonably" understood the statute to permit the agency to consider the investment-dampening effects of unbundling and the fact that alternative unbundling requirements would "mitigate" any CLEC impairment. App. 35a-42a. The court concluded that the FCC's decision on FTTH loops was sufficiently "buttressed by the evidence in the record" as to investment effects and thus found it unnecessary to decide whether the record also supported the FCC's no-impairment conclusion. App. 43a-44a. The court also held that the FCC reasonably concluded that "line sharing is not essential to maintain robust competition in this market, a conclusion based on permissible considerations and supported by evidence in the record." App. 46a-47a. Finally, the court agreed with the Commission's conclusion, "supported by very strong record evidence," that the broadband market is characterized by "robust intermodal competition from cable providers" and that imposing unbundling obligations on ILECs, the secondary players in that market, is not warranted given that "intermodal competition from cable ensures the persistence of substantial competition." App. 41a, 47a.

On May 24, 2004, the FCC majority (but not the United States), joined by the CLECs and the state commissions, asked the D.C. Circuit to stay its mandate pending the filing and disposition of petitions for certiorari. On June 4, 2004, the D.C. Circuit unanimously denied the stay motions.

On June 9, the Solicitor General announced that he would not seek either a stay of the D.C. Circuit's mandate or a writ of certiorari from this Court, although he authorized the FCC

to proceed in its own name if it so chose.[9] The FCC, however, likewise decided not to seek review of the D.C. Circuit's decision, electing instead to proceed to adopt new rules.[10]

On June 10, 2004, NARUC and the same CLECs that now seek certiorari filed applications with the Chief Justice seeking a stay of the D.C. Circuit mandate. On June 14, the Chief Justice denied those applications.

6. On August 20, 2004, the FCC adopted interim rules to govern narrowband unbundling and issued a *Notice of Proposed Rulemaking* seeking comments on permanent rules. The interim rules will be in effect for six months.[11] The FCC has scheduled a meeting to adopt permanent new rules on December 15, 2004.

REASONS FOR DENYING THE PETITIONS

I. THE D.C. CIRCUIT'S INVALIDATION OF THE FCC'S REIMPOSITION OF BLANKET NARROWBAND UNBUNDLING DOES NOT MERIT REVIEW

The D.C. Circuit's decision vacating the FCC's imposition of unbundling requirements for mass-market switching and high-capacity facilities is correct, is consistent with this Court's precedents, and conflicts with no decision of any other court of appeals. Plenary review is not warranted.

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[9] Press Release, FCC, *Office of Solicitor General Will Not Appeal DC Circuit Decision* (June 9, 2004); *Solicitor General Authorizes FCC To Represent Itself in Appeal*, Reuters (June 9, 2004).

[10] Press Release, FCC, *FCC Chairman Michael K. Powell Announces Plans for Local Telephone Competition Rules* (June 14, 2004).

[11] Because the FCC's interim rules, in effect, merely reinstate the blanket unbundling rules struck down previously by this Court and twice by the D.C. Circuit, they amount to a self-granted stay of the D.C. Circuit's mandate, a stay that both the D.C. Circuit and this Court declined to grant. Accordingly, some of the respondents have filed a petition for a writ of mandamus with the D.C. Circuit seeking to have the interim rules vacated. That petition is pending.

A. Although petitioners claim that the decision below will significantly impede the FCC's administration of the 1996 Act, both the Solicitor General and the FCC have reached a different judgment and have decided *not* to seek review of the decision themselves. If neither the federal agency charged with administering the 1996 Act nor the government's chief representative in this Court believes that the effect of the court of appeals' decision is sufficiently deleterious to warrant filing a petition for a writ of certiorari, there is no reason for this Court to grant plenary review at the behest of other parties. As noted above, AT&T, a petitioner here, has itself argued in an analogous context that there "is no cause for this Court" to grant review where an agency has declined to seek certiorari from a circuit court decision vacating the agency's rules.[12]

That analysis is correct, and it is dispositive of the petitioners' contrary arguments here. If the D.C. Circuit's decision in fact "reversed the basic premise of the [1996] Act," "immensely complicate[d] the task" before the FCC, or required determinations that the FCC "cannot possibly make," NARUC Pet. 22, 24, 25, surely the FCC and the United States would have sought review in this Court. Instead, they decided against filing a certiorari petition, and the FCC, as discussed further below, has initiated a proceeding to adopt new rules that comply with the D.C. Circuit's mandate by the end of the year.[13]

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[12] Br. in Opp. for Time Warner Entertainment Co./AT&T Corp. at 12, *Consumer Fed'n of Am. v. FCC*, No. 01-223 (U.S. filed Nov. 2, 2001).

[13] In this regard, petitioners are wrong to suggest that the court of appeals has required the FCC, on remand, to make "hundreds of thousands of discrete judgments" as to the particular circumstances in individual markets. NARUC Pet. 24. As the FCC has already acknowledged (*see* App. 204a (¶ 121)), the 1996 Act and the D.C. Circuit's decisions simply require the Commission to draw reasonable lines determining the classes of markets that are suitable for competitive supply.

Indeed, we are aware of *no* analogous case (and petitioners have cited none) in which this Court granted certiorari to review a lower court decision striking down an agency rule despite the fact that the agency itself chose not to seek review. In *Verizon*, for example, the Court granted certiorari limited to the questions presented by the government and declined review of other questions on which the government lost below and that were presented only by AT&T and WorldCom.[14] The Court declined plenary review of those questions even though the Solicitor General, on behalf of the United States and the FCC as respondents, urged the Court to grant review.[15] Similarly, the Court denied the request of AT&T and other CLECs to review the D.C. Circuit's decision in *USTA I* after the FCC and the United States declined to petition for certiorari from that decision. *See* 538 U.S. 940 (2003) (No. 02-858).

B. There is even less reason to grant plenary review where, as here, the responsible agency has stated that it intends to adopt new rules by the end of this year to replace those that the D.C. Circuit vacated. *See supra* pp. 1, 13. As the Solicitor General previously explained in similar circumstances, the impending issuance of new rules means that review by this Court is "not necessary" and "would not be an efficient use of judicial or agency resources."[16]

C. Even apart from these considerations, there is no basis for plenary review of the D.C. Circuit's judgment.

1. NARUC's lead argument rests on the following unlikely proposition: when Congress enacts a statute (or at least a statute with some elements of "cooperative federal-

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[14] Petition for a Writ of Certiorari at 21-24, *AT&T Corp. v. Iowa Utils. Bd.*, No. 00-590 (U.S. filed Oct. 13, 2000); *AT&T Corp. v. Iowa Utils. Bd.*, 531 U.S. 1124 (2001) (No. 00-590).

[15] Br. for FCC and United States at 16-21, *Verizon Communications, Inc. v. FCC*, Nos. 00-511 *et al.* (U.S. filed Nov. 17, 2000).

[16] Br. for Fed. Resp. at 14, 16-17, *WorldCom, Inc. v. USTA*, No. 02-858 (U.S. filed Feb. 5, 2003).

ism") specifically assigning certain tasks to a federal agency, that agency is nonetheless free to abdicate its congressionally assigned responsibilities and delegate ultimate decision-making authority instead to 51 separate state agencies. *See* NARUC Pet. 15-21; *see also* AT&T Pet. 28-30. That remarkable view finds no support in the precedent of this or any other federal court. The D.C. Circuit's decision to reject it is correct and does not raise a significant question meriting this Court's review.

As this Court has explained, the 1996 Act creates a "*federal* regime" governing local telecommunications competition and, as to the matters it covers, takes the "regulation of local telecommunications competition away from the States." *IUB*, 525 U.S. at 378 n.6; *see id.* (a federal regime "administered by 50 independent state agencies" would be "surpassing strange"); *id.* at 385 n.10 ("we are aware of no . . . instances in which federal policymaking has been turned over to state administrative agencies").

The federal nature of this new regime is particularly clear in the unbundling provisions at issue here. Congress explicitly assigned to a single federal agency, not to state commissions, the obligation to decide which facilities should be unbundled under the 1996 Act. As the D.C. Circuit explained, § 251(d)(2) requires that the *FCC* "'determin[e]' which network elements shall be made available to CLECs on an unbundled basis." App. 9a (quoting § 251(d)(2)). Moreover, Congress required the FCC to adopt any necessary unbundling obligations within six months of the statute's enactment, *see* § 251(d)(1), in time for the state commissions to apply those binding determinations in arbitration proceedings, which have a nine-month deadline, *see* § 252(b)(4)(C). In those arbitrations, state commissions are required to adhere to "the regulations prescribed by the [FCC] pursuant to section 251," § 252(c)(1), including the unbundling determinations that the FCC is required to make under § 251(d).

For these reasons, the FCC itself concluded that Congress "direct[ed] the *Commission* to perform" the "analysis required to determine what network elements should be made available." App. 259a (¶ 179) (emphasis added). By contrast, the FCC explained, the 1996 Act gave the states *no* power to determine the facilities that should or should not be unbundled: "states do not have plenary authority under federal law to create, modify or eliminate unbundling obligations," App. 264a (¶ 187); *compare* NARUC Pet. 18 (stating incorrectly, and in conflict with the FCC's own position, that the federal statute grants unbundling authority to the states).[17]

By vacating the FCC's purported delegation of ultimate unbundling authority, the D.C. Circuit simply held that the 1996 Act means what it says when it assigns unbundling duties to the FCC, and that there is no "presumption" that a federal agency assigned a task by Congress may cede that duty to an instrumentality of a separate sovereign. *See* App. 10a. On the contrary, as the D.C. Circuit explained, "when an agency delegates power to outside parties" — particularly, as in this case, to separate sovereigns outside the federal system of checks and balances — "lines of accountability may blur, undermining an important democratic check on government decision-making" and "aggravat[ing] the risk" that the policy goals reflected in the "underlying statutory scheme" will remain unfulfilled. App. 10a-11a (citing *Printz v. United States*, 521 U.S. 898, 922-23 (1997)).

In challenging that conclusion, petitioners rely almost exclusively on two cases, *Batterton v. Francis*, 432 U.S. 416 (1977), and *Wisconsin Department of Health & Family Services v. Blumer*, 534 U.S. 473 (2002). They wrongly assert that these cases — which no party even cited in merits

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[17] The unbundling provisions of the 1996 Act stand in marked contrast to other statutory sections, such as § 252(d), that expressly assign *other* statutory "determinations" to the states. *See* App. 15a-16a (noting that, although "other provisions of the statute carefully delineate a particular role for the state commissions," the unbundling provisions "do[] not").

briefing before the D.C. Circuit — are controlling on this issue and "conflict[]" with the court of appeals' ruling. *See* NARUC Pet. 18. In neither case did the federal agency purport, as the FCC did here, to delegate to the states a responsibility that Congress expressly assigned to it, much less did the Court establish the broad presumption that petitioners champion.

In *Batterton*, the relevant statute made certain governmental benefits turn on a state's decision that a child had been deprived of parental support because of "'the unemployment (as determined in accordance with *standards* prescribed by the Secretary)'" of the child's parent. 432 U.S. at 418 n.2 (quoting 42 U.S.C. § 607(a)) (emphasis added). The statute thus anticipated that "the power to 'determine' unemployment [would] remain[] with the States," and that the Secretary would merely adopt relevant "standards" for the states to use. *Id.* at 430. The Secretary did precisely what the statute required of him. He created the relevant standards, which allowed the states some leeway to determine whether particular individuals were unemployed. The Court accordingly held that the Secretary had fulfilled his statutory duty. *See id.* ("we conclude that the power to prescribe 'standards' gives the Secretary sufficient flexibility to recognize some local options").

The Court's result turned, therefore, on the *specific terms of the statute*, which required limited action by the Secretary — action that the Secretary had carried out — and reserved for the states the duty to "determine" whether the parent was unemployed. The Court specifically emphasized that if, instead of requiring the Secretary simply to adopt standards governing unemployment, Congress had said that unemployment must be "defined by the Secretary," the statute would have required the Secretary to make a specific determination and would have "*preclud[ed]*" any contrary local policies. *Id.* (emphasis added).

The circumstances here perfectly fit the hypothetical that *Batterton* distinguished. In contrast to *Batterton*, where Congress asked the states to make the relevant "determin[ations]," the 1996 Act expressly requires *the FCC* to "determin[e]" what UNEs must be made available, as the FCC has correctly acknowledged. *See* 47 U.S.C. § 251(d)(2); *see also* App. 9a; App. 259a, 264a (¶¶ 179, 187). And, unlike the Secretary in *Batterton*, the FCC did not even arguably do what the statute required of it. Instead, it expressly shifted to the states the functions that Congress assigned to the FCC in § 251(d)(2). *See, e.g.*, App. 265a-268a (¶¶ 188-190). Far from approving of such a result, *Batterton* makes clear that, where Congress directs a federal agency to do something (whether to define "unemployment" or to determine which network elements must be made available), it is that federal body, not 51 separate states agencies, that must carry out the responsibility.

Petitioners' reliance on *Blumer* is similarly misplaced. There, the federal program required the states to establish plans for implementing a certain Medicaid program and to do so in accordance with federal regulations. *See* 534 U.S. at 479. The Secretary had indicated that, with respect to a technical issue (involving the allocation of income between spouses for purposes of program eligibility), states could legitimately employ more than one methodology because the statute did not "'clearly requir[e]'" the use of a single mechanism. *Id.* at 484-85 (quoting 66 Fed. Reg. 46763, 46767 (2001)) (alteration in original). *Blumer* held only that the methodology used in one state (Wisconsin) was not inconsistent with the statutory language, *see id.* at 489-95, and noted in dicta that, as the Secretary had suggested, other approaches might be consistent as well, *see id.* at 495 (not "definitively resolv[ing] th[e] matter" but noting that such "leeway" was "characteristic of Medicaid").

Again, *Blumer* does not suggest that the Secretary could ignore a statutory directive to take a specific action. On the contrary, the Court stressed that the relevant statute allowed

each state to "strike its own balance in the implementation of the Act," *id.* at 497 (internal quotation marks, brackets omitted), a sharp contrast to the unbundling provisions of the 1996 Act, which, the FCC itself has stated, "direct[]" the FCC to perform the relevant task. App. 259a (¶ 179).

There is also no basis for the claim, raised by NARUC alone, that the D.C. Circuit's decision conflicts with two Ninth Circuit decisions. The D.C. Circuit fully explained why one of those cases, *Southern Pacific Transportation Co. v. Watt*, 700 F.2d 550 (9th Cir. 1983), does not support the FCC's subdelegation theory. *See* App. 13a. The Ninth Circuit specifically concluded that in the relevant statutes *Congress* had authorized the federal agency to precondition federal grants of rights-of-way through Indian reservations on tribal consent, so, unlike here, there was no issue of an agency delegating to another sovereign a responsibility that Congress had not authorized the agency to delegate. *See* 700 F.2d at 554. Moreover, the Ninth Circuit made plain that the federal agency there was not "relinquish[ing] . . . [its] final authority to approve" the right-of-way applications. *Id.* at 556; *see* App. 13a. Again, that is in marked contrast to this case, where the FCC has authorized states to make final unbundling decisions that will become effective without any review by the FCC. *See* App. 13a, 15a.

In the other case, *Vierra v. Rubin*, 915 F.2d 1372 (9th Cir. 1990), the Ninth Circuit found that the state's actions were inconsistent with the statute, rendering immaterial the question whether states could ever exercise the authority at issue. *See id.* at 1378. Even in dicta, the Ninth Circuit said only that the agency's delegation to the states of the authority to define a statutory term was "not impermissible per se" in light of the "breadth of discretion granted to states" by Congress in the AFDC program. *Id.* at 1377-78 (internal quotation marks omitted). Here, Congress did not grant broad discretion to the states with respect to unbundling, but instead specifically assigned that responsibility to the FCC.

2. Even if there were substance to petitioners' attack on the D.C. Circuit's delegation decision, that argument alone would not be a basis for reinstating the FCC's rules. Rather, this Court would also be required to review and reverse the D.C. Circuit's ordinary administrative-law determinations that the FCC's rules were arbitrary, insufficiently explained, and/or contrary to the statute. These include the D.C. Circuit's finding that the FCC failed to reconcile its prior approvals of ILEC hot-cut processes, to consider narrower alternatives to unbundling (such as rolling hot cuts) that had been raised in the record, to explain how lack of CLEC entry in markets with below-cost retail rates can be understood to result from "impairment," to draw any rational inferences from the ability of carriers to deploy facilities on similar routes for high-capacity facilities, and to consider the fact that carriers already were successfully providing high-capacity services without access to UNEs by using tariffed services instead. *See* App. 19a-21a, 27a-32a. Those decisions involve applications of settled principles of administrative law, and there is no reason for this Court to grant review as to them. *See generally Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490-91 (1951) (lower courts should determine whether agency determinations are supported by the record created in a particular case, and this Court's power to review "ought seldom to be called into action").

In arguing to the contrary, petitioners assert that, for years, the D.C. Circuit has been disregarding binding precedent from this Court interpreting the 1996 Act. In particular, they claim that the D.C. Circuit's decisions here and in *USTA I* are inconsistent with *IUB* and *Verizon*, both of which predate those court of appeals decisions and which the court of appeals has in fact considered at length. *See, e.g.*, *USTA I*, 290 F.3d at 424-29.

That argument lacks substance. Petitioners wrongly assert that this Court's decisions compel federal courts to rubber-stamp essentially any unbundling regime the FCC adopts, no matter how extreme the result or how arbitrary or un-

explained the agency's reasoning. *See* AT&T Pet. 22-25. But far from deferring to the FCC's views on these issues, this Court *vacated* the FCC's unbundling rules in *IUB*. 525 U.S. at 397; *compare* AT&T Pet. i, 2 (suggesting wrongly that the D.C. Circuit's decisions are grounded in conclusions adopted only by Justice Breyer). The Court did so because, among other things, the FCC did not consider whether CLECs could obtain facilities from sources other than the ILEC and because the FCC's decision did not impose a "*limiting* standard" that was "rationally related to the goals of the Act." 525 U.S at 388-89 (emphasis added). Thus, although the Court did determine that the 1996 Act can be read to give CLECs "most promiscuous rights" in *other* respects, *id.* at 397, the Court emphasized (in the very same paragraph) that § 251(d)(2) placed "clear limits" on the FCC's authority with respect to unbundling, *id.*

Although petitioners disparage the D.C. Circuit's insistence that impairment findings must be based on appropriate geographic and product markets, *see* AT&T Pet. 25-26, that conclusion follows directly from this Court's judgment that the Commission could not "blind itself to the availability of elements outside the incumbent's network." *IUB*, 525 U.S. at 389. As we discussed above, *see supra* p.2, one cannot rationally determine whether alternative facilities are, or reasonably can be made, "available" outside the network without reference to a relevant market. *See* App. 27a ("Any process of inferring impairment (or its absence) from levels of deployment depends on a sensible definition of the markets in which deployment is counted."). Thus, far from imposing an "extra-statutory" requirement, *see* AT&T Pet. i, 7,[18]

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[18] Contrary to AT&T's claim, the D.C. Circuit did not hold that it was "not enough that the FCC was 'adhering' to a permissible construction of the 'letter' of § 251(d)(2)." AT&T Pet. 24 (quoting *USTA I*, 290 F.3d at 429). Rather, the court in *USTA I* found the FCC's claim that it was adhering to the statute by considering only one technology used to offer broadband service — and ignoring other competing technologies — to be

the D.C. Circuit's determination is firmly rooted in this Court's authoritative interpretation of the text of the 1996 Act.

Beyond this, petitioners are simply mistaken in contending that this Court has embraced unrestrained unbundling. *See* AT&T Pet. 24-26. As noted, *IUB* vacated the FCC's initial rules precisely because, if Congress had intended to authorize "blanket" and "unrestricted" access to UNEs, "it would not have included § 251(d)(2) in the statute at all." 525 U.S. at 390. *Verizon* likewise establishes that UNE availability is properly limited to true "*bottleneck*" facilities in order to enable facilities-based competition in other, more-easily duplicated facilities. The Court thus explained that "competition as to 'unshared' elements may, in many cases, only be possible if incumbents simultaneously share with entrants some costly-to-duplicate elements . . . . In this case, low prices for the elements to be leased become crucial in inducing the competitor to enter and build." 535 U.S at 510 n.27; *see id.* at 502 n.20.

Furthermore, nothing in this Court's decisions precludes the D.C. Circuit from undertaking its ordinary function of reviewing the FCC's determinations to ensure that they are adequately reasoned. That is the everyday work of the D.C. Circuit, and there is no reason for this Court to review the D.C. Circuit's case-specific application of settled principles of administrative law.

For example, the D.C. Circuit's conclusion that the FCC had not "articulated any reasonable explanation" for rejecting more tailored alternatives to switch unbundling, App. 20a-21a, is the sort of decision that courts of appeals make routinely in cases where an agency's decision does not provide a rational basis for its conclusion. Although AT&T (at 26) again wrongly derides the D.C. Circuit's decision as "extra-

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"quite unreasonable" and thus unsustainable under *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984). *See* 290 F.3d at 429.

statutory," this Court has long established that agencies may not simply ignore reasonable alternatives that were raised by parties to the agency proceeding and that would serve the purposes of the relevant statute. *See, e.g., Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983) ("At the very least this alternative way of achieving the objectives of the Act should have been addressed and adequate reasons given for its abandonment."). Given the FCC's own recognition that "unbundling is one of the most intrusive forms of economic regulation" and "one of the most difficult to administer," App. 223a (¶ 141), it was hardly inconsistent with established principles of administrative law or with the decisions of this Court to require the FCC to consider alternatives that would obtain the same benefits as unrestricted unbundling without the same costs.

The D.C. Circuit's similar conclusion that the FCC must "consider[]" the availability of tariffed alternatives to UNEs, App. 31a-32a, again flows from this Court's decisions — which, as noted, indicate that unbundling is not to be applied where CLECs have competed successfully using facilities derived through alternative means. *See IUB*, 525 U.S. at 389-90 & n.11 (explaining that, even if there is a difference in cost, CLECs are not "impaired" within the meaning of the statute so long as they can still compete using alternative facilities). In arguing otherwise, AT&T simply disregards this Court's holding on that point. *See* AT&T Pet. 26-27.[19]

Finally, the D.C. Circuit's conclusion that the FCC failed to provide any explanation "connect[ing]" the existence of

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[19] AT&T wrongly claims (at 27) that the Eighth Circuit decided an indistinguishable issue in *Iowa Utilities Board v. FCC*, 120 F.3d 753, 809 (8th Cir. 1997), *aff'd in part, rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). But, as the D.C. Circuit properly understood, the Eighth Circuit's discussion dealt with the definition of a "network element," not the distinct question of the proper impairment inquiry (an issue on which this Court reversed the Eighth Circuit). *See* App. 31a.

below-cost retail prices to "impairment" or the "purposes of the Act," App. 24a, not only follows directly from this Court's statements that a proper unbundling standard must further the goals of the Act, *see IUB*, 525 U.S. at 388, but also simply requires the sort of rational agency analysis and explanation that courts routinely demand of agencies. Simply put, the D.C. Circuit required the FCC to explain why it was reasonable and consistent with statutory purposes to mandate unbundling on the theory that CLECs are impaired, not because they cannot reasonably duplicate the facilities at issue, but because state-regulated retail rates are artificially low. *See* App. 24a-25a (explaining that the FCC has "said nothing" that "locate[s] its treatment of th[is] issue in any purposeful reading of the Act"). AT&T's petition does not explain why such an ordinary administrative-law determination merits review, particularly when the court of appeals merely insisted on compliance with this Court's own conclusion that a proper impairment standard must accord with the purposes of the Act.

II. THE D.C. CIRCUIT'S AFFIRMANCE OF THE FCC'S DECISION LIMITING UNBUNDLING OF COMPETITIVE BROADBAND FACILITIES DOES NOT MERIT REVIEW

Petitioners also take issue with the D.C. Circuit's affirmance of the FCC's decision to require only limited unbundling of the facilities ILECs use to provide service in the highly competitive market for broadband services. They again present no issue warranting plenary review.

A. As an initial matter, it is important to understand that, contrary to the impression the petitions seek to leave, the FCC found that CLECs were *not* impaired without UNE access to most of the broadband facilities at issue here. *See* App. 327a-330a (¶¶ 258-260) (line sharing), 342a-346a (¶¶ 273-276) (FTTH loops). And, in the one instance where the FCC found that some limited impairment may exist (hybrid loops), it concluded, among other things, that access to

alternative facilities "adequately addresses the impairment that competitive LECs face," App. 357a (¶ 291), and it still imposed some unbundling obligations to allow CLECs to obtain access to transmission facilities for traditional narrowband voice calls, *see* App. 353a (¶ 286).

These discrete record-based determinations do not merit review by this Court. In each instance, the FCC weighed the evidence of impairment and found, based on its review of the record, either that impairment did not exist or that it could be addressed through alternative arrangements and limited unbundling requirements. Furthermore, the FCC reasonably concluded that the competitive context — including the dominant market position of cable providers as well as alternative providers such as fixed wireless — ensured that consumers would continue to benefit from robust competition without unbundling, in which case there is no basis for imposing the costs of mandatory access to ILEC facilities. There is no reason for the Court to grant review as to such case-specific technical determinations involving application of the impairment standard to specific kinds of facilities.

B. In addition to its impairment findings, the FCC *also* concluded that requiring unbundling of these broadband facilities would discourage facilities-based competition, in conflict with the core goals of the 1996 Act and the specific congressional intent reflected in § 706 of the 1996 Act, which by its terms requires the Commission to take actions that promote deployment of advanced telecommunications capabilities. *See* 47 U.S.C. § 157 note (Commission "shall encourage the deployment . . . of advanced telecommunications capability . . . by utilizing . . . measures that promote competition in the local telecommunications market[] or other regulating methods that remove barriers to infrastructure investment"). Because § 251(d)(2) makes impairment a "minimum" consideration, the FCC reasonably interpreted the statute to, at the least, permit it to consider the congressional policy in favor of facilities deployment set forth in § 706 in determining whether facilities should be unbundled.

See App. 249a-250a (¶ 173). The Commission concluded that Congress's goal of encouraging facilities deployment further weighed against mandating unbundling of specific broadband facilities. *See, e.g.*, App. 348a (¶ 278).

Thus, contrary to AT&T's claim, to the extent that investment incentives provided a justification to limit broadband unbundling, that is because the FCC, *not* the D.C. Circuit, reasonably interpreted the statute to authorize consideration of that issue. *Compare* AT&T Pet. 15-22 (discussing this issue in terms of the "holding[s]" and "conclu[sions]" of the "D.C. Circuit" and disregarding the FCC findings that the D.C. Circuit affirmed) *with* App. 35a-37a (affirming *the FCC's* interpretation as "reasonabl[e]"). The D.C. Circuit's conclusion that the FCC properly read the "at a minimum" clause of § 252 together with § 706 to authorize consideration of effects on facilities-based competition thus involves the application of standard *Chevron* principles and does not warrant review.

Nor is there any plausible claim that the D.C. Circuit, in affirming the FCC's reading of the statute, disregarded this Court's decisions in *IUB* and *Verizon*. *Compare* AT&T Pet. 16-19; *see also* Cal. Pet. 17-19. Neither of those cases involved the distinct policy issues raised by unbundling of the new high-speed broadband facilities in which both ILECs and CLECs are investing today (as opposed to legacy voice-only facilities). Thus, neither case involved application of § 706 and the interplay between that provision and the "at a minimum" language in § 251(d)(2). Moreover, in this case, the FCC has itself concluded, based on substantial evidence in the record, that requiring unbundling of these next-generation facilities will impede investment. *See, e.g.*, App. 348a-349a (¶ 278 & n.818) (noting record statements that declining to require unbundling would increase investment in next-generation fiber to the home by more than 600%). *Verizon* does not establish that the FCC may not reasonably limit unbundling where it finds that to be the case.

Indeed, even AT&T ultimately acknowledges that it is not arguing that "investment cannot be considered by the FCC in making unbundling determinations," AT&T Pet. 19, but rather is arguing only that such effects cannot be "presumed to result . . . or treated as established on the basis of vague 'suggestions' and speculation," *id.* In the end, therefore, AT&T's argument is limited to whether the FCC's case-specific conclusions about the effect of unbundling on investment in next-generation facilities were supported by substantial evidence. Not only is AT&T wrong for the specific reasons identified by the D.C. Circuit in rejecting these record-based claims, *see, e.g.*, App. 39a-42a, but also its argument presents a classic fact-bound issue that does not merit review by this Court. *See Universal Camera, supra.*

Finally, contrary to AT&T's lengthy argument, it is incorrect to say that the FCC's decision presents any issue of "'balanc[ing]' the benefits of greater competition against . . . diminished investment and innovation." AT&T Pet. 16. In concluding that CLECs are not impaired without these facilities (or could remedy any impairment through access to other facilities and limited unbundling), the FCC reasoned that CLECs could compete without the particular UNEs at issue and thus that there was *no* trade-off to be made. And the FCC highlighted the existence of intermodal alternatives that are not dependent on UNEs precisely because those alternatives ensure that consumers will get the benefits of competitive choice regardless of whether facilities are unbundled. *See, e.g.*, App. 332a (¶ 263). AT&T may disagree with the FCC's (and the D.C. Circuit's) analysis of the evidence — evidence showing that a *majority* of broadband consumers in fact rely upon intermodal choices such as cable modem, App. 331a (¶ 262 & n.777) — but that does not mean that the FCC was unconcerned about competition or that its evaluation of this evidence merits review by this Court.[20]

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[20] California argues (at 14-16) that the Court should review the FCC's determinations regarding line sharing and hybrid loops because they are

III. PETITIONERS' ADDITIONAL ARGUMENTS ARE EQUALLY INSUBSTANTIAL

A. Both California (at 20-23) and NARUC (at 29-30) take issue with the FCC's conclusion that the federal agency, not the states, has jurisdiction to determine rates for facilities that Bell Operating Companies must make available under § 271, but that are not subject to unbundling under § 251(c)(3).

Although these parties rest their arguments on the state commissions' § 252 authority to arbitrate pricing disputes subject to federal-court review, *see, e.g.*, NARUC Pet. 29, the statute makes clear that state pricing authority under § 252 is limited to facilities that must be unbundled under § 251(c)(3). *See* 47 U.S.C. § 252(d)(1) (giving state commissions authority to determine rates for network elements "for purposes of [§ 251(c)(3)]"). It is equally clear that Congress gave the FCC, not state commissions, sole authority to implement and enforce § 271. *See id.* § 271(d)(3), (6)(A). For these reasons, petitioners' arguments about the allegedly broad scope of state authority under § 252 are irrelevant: the specific requirements of §§ 251 and 252 simply do not apply when a facility must be made available only as a result of § 271. *See* App. 54a (concluding that there is "no serious argument" that the "§ 251 pricing rules apply to unbundling pursuant to § 271"). In any event, neither this Court nor any other court of appeals has reached a different conclusion on this § 271 issue, and there is no other reason for the Court to review the

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allegedly "arbitrary and capricious" and because the FCC supposedly overstated the significance of widespread cable deployment. There is no reason for the Court to wade into such record-based issues, but in any case California's arguments are unpersuasive and do not overcome the deference to which the FCC is entitled on such issues. For instance, California does not dispute that, as noted in the text, cable modem is by far the market-leading technology. And, even in California, the FCC's statistics demonstrate that there are two or more broadband providers in 92% of zip codes. *See* Indus. Anal. & Tech. Div., Wireline Competition Bureau, FCC, *High-Speed Services for Internet Access: Status as of December 31, 2003*, at Table 13 (June 2004).

FCC's sensible resolution of this specific question of statutory interpretation.

B. Contrary to California's argument, there is also no reason for the Court to review the FCC's decision to establish a methodology for setting rates during the transition period when ILECs must still make line sharing available. *See* Cal. Pet. 20-23. As the FCC explained, because line sharing is no longer required under § 251, the FCC employed its general rulemaking authority under § 201 of the Communications Act to establish requirements for this transitional period. *See* App. 338a (¶ 267). State authority to set rates under § 252 is thus again irrelevant. Additionally, even if § 252 applied, this Court has held that the FCC has authority to establish a pricing methodology governing state action under that provision, *see IUB*, 525 U.S. at 384-85, and that is all the FCC has done here. *See* App. 336a (¶ 265). Finally, and in any event, because this issue involves only a transitional mechanism that will expire in 2006 and that governs access to a single facility, it does not raise an issue meriting review.

C. California challenges the FCC's analysis of state authority to require unbundling of network elements under state law in circumstances where the FCC has found that federal law does not require such unbundling. *See* Cal. Pet. 23-28; App. 272a (¶ 195). But the D.C. Circuit concluded that this issue was not ripe because the FCC "has not taken any view on any attempted state unbundling order." App. 63a. The D.C. Circuit applied standard two-pronged ripeness analysis, *see* App. 63a-64a; *Abbott Labs. v. Gardner*, 387 U.S. 136, 149, 151 (1967), and California does not explain why the D.C. Circuit's application of those established principles to this case merits review. Nor does California claim that the court of appeals' ripeness decision conflicts with any ruling of this Court or of any other court of appeals. It has thus provided no reason to grant plenary review.

CONCLUSION

The petitions for a writ of certiorari should be denied.

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September 1, 2004